EQUITY CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF
NORTH-CAROLINA.

DECEMBER TERM, 1832.

RICHARD BOYD *et al.* v. JOHN D. HAWKINS *et al.*

Where one, who had become surety for an insolvent person, was, in order to obtain forbearance, compelled to convey his estate, as a security for the debt, to a trustee nominated by the creditor, who also became assignee of the effects of the principal debtor to secure the surety: *It was held*, that a subsequent agreement, whereby the surety gave the trustee one fourth of the estate of the principal debtor, as a compensation for managing it, was invalid.

The bill charged, that on the 2nd day of July, 1824, the complainant *Boyd*, being largely indebted (about $ 34,000,) to the State Bank of North-Carolina, as surety for his brother *Alexander Boyd*, did, for the purpose of obtaining forbearance, and also securing the payment of that debt, convey to the defendants, *Hawkins* and *Robards*, as trustees, eighty slaves, and sundry large tracts of land, including one on the Roanoke in Warren County, containing four thousand acres; that he had since paid the debts and received a discharge from the bank, and a declaration to that effect to the trustees, and had requested a re-conveyance according to the terms of the deed; but that the defendant *Hawkins*, alleged that the plaintiff was indebted to him for compensation for services rendered under the deed, and advances made in discharge of the debts, and refused to convey, but had in his name and that of his co-trustee, advertised the Warren land for sale, and instituted an action of detinue

Dec. 1832.

Boyd v. Hawkins.

for the slaves. The bill denied any debt from the plaintiff to *Hawkins*, and averred a willingness to make a reasonable allowance for his services, or by way of commissions, (for which there was a provision in the deed, the amount to be determined by the bank); and insisted that *Hawkins* was largely indebted to *Boyd* upon his transactions as trustee in another deed, executed on the same day, and for the same purposes as the former, for certain property in Virginia, for the settlement of which a bill had been filed by *Boyd* in a court of chancery in that state—that *Hawkins* put in an answer, to that bill insisting upon sundry demands arising to him upon this last deed, and also for services rendered touching the estates in North-Carolina, conveyed by the deed first mentioned. The bill then stated a subsequent mortgage by *Boyd* to the other plaintiffs, *Thornton* and *Davison*. The bank and the trustees were made defendants, and a re-conveyance prayed, and in the mean time, an injunction against the sale and action at law, and general relief.

The answer of the bank admitted the payment of the debt, and submitted to a re-conveyance, but not so as to interfere with any just claims the trustees might have against the estates.

The defendant *Robards*, in his answer, set up no claim on his own behalf, and admitted that it was understood when the deeds were signed, that he was not to be active in the execution of the trusts, which were expected to be very troublesome, particularly in relation to the property in Virginia, but that the defendant *Hawkins*, was to undertake the sole management of it; that he did manage it successfully, and at much risk and trouble, and greatly to the advantage of *Boyd* in many particulars, which were mentioned in the answer of *Hawkins* himself.

That answer, upon which arose all the material questions in the cause, stated, that *Alexander Boyd*, of Mecklenburg county in Virginia, owed the large debts, for which his brother, the plaintiff, *Richard* was surety, to the State Bank, and also, a further debt of about $9,000 to *Richard* himself; and that becoming entirely insol-

vent. he, *Alexander*, conveyed by deed of trust to one *Rainny* and others, on the 11th of June 1824, as a security to *Richard Boyd*, a very large estate consisting of many tracts of land in that county, about 140 slaves, the crops growing on sundry plantations, besides his stock, plantation waggons, tools, &c.; that he had before conveyed to *Henry Fitts* of Warren county, as a counter security for *Richard Boyd's* endorsements, several tracts of land and other property in this State. It further stated, that the Bank had a considerable part of its debt in judgment, and was about proceeding to a sale of *R. Boyd's* estate in Warren: and that such was the prospect of his distress from those, and other debts which he owed, and the small sum which he expected to realise from *Alexander Boyd's* conveyances, in consequence of previous incumbrances, that *Richard Boyd* himself apprehended insolvency, which it was generally supposed would be the case in the winding up; that it was of the last consequence to him to gain indulgence, and also to have his claims under *A. Boyd's* assignment vigilantly attended to and pressed, and that the bank would not forbear, unless he made a deed of trust to persons in whom the directors had confidence; that application was made to him, *Hawkins*, by *Boyd* and his friends, but he declined because he was aware, from the nature of the business, that it would occupy much of his time, and take his attention from his own affairs, and also because he doubted *Boyd's* integrity from previous transactions, upon which a difference had arisen between them; but that at length, upon a second application urgently made, he gave his assent, being the brother-in-law of *R. Boyd*, and wishing to serve him as he seemed greatly distressed by his embarrassments and impending ruin; that the parties came to Raleigh, and the deed mentioned in the bill was executed; that but little was then expected by the bank or *R. Boyd*, to be received under the assignments of *A. Boyd*; but that the president of the bank, after the execution of the former deed, proposed that *R. Boyd* should transfer the benefit thereof to the same trustees, for the same purposes, which

Dec. 1832

Boyd
v.
Hawkins.

was immediately done; that *Hawkins* was to take on himself the active part of the trusts which all parties expected to be difficult, perplexing and troublesome, and probably leading to much litigation; that he proposed to the bank to give him the liberty of drawing for money to discharge other incumbrances, but was refused, unless he would become personally responsible, because the debt was considered as large as could be safely trusted upon the personal security of *Boyd*, or that of his property conveyed, which was all, or nearly all he had; the answer farther stated, that all the property conveyed to *Fitts* by *A. Boyd*, had been sold under executions, and could only be recovered by suits; and *Boyd* engaged the defendant to recover that also—that *R. Boyd* himself, was indebted to other persons in several sums mentioned, amounting to $6,000, for which there were judgments or deeds of trust, on which sales were threatened, as he had no funds, and was incapable of action himself, or had given over exertion in despair. It was further stated, that *Alexander Boyd* owed a debt to one *B. Burwell* of about $20,000, for securing which, there was a deed of trust for about ninety of the slaves mentioned in the deed to *Rainny* and others; that he was indebted to others by judgments in Virginia, on which executions had been sued, having a lien prior to the deed of 11th of June, and amongst them one in favor of *Thos. Brown*, for about $8,000 and interest: which appeared from an exhibit to have been against *R. Boyd* and four others, as the sureties of *A. Boyd*. The answer proceeded, that on the 4th of July, the defendant heard that the executions of *Brown* and others, to the amount of $10,000, were levied on the slaves, work-horses, and other effects, on the plantations, and that sales would be forced, which would prove destructive to the growing crops, and ruinous to *R. Boyd*; that he went over to Mecklenburg, and urged the trustees there to assert their right, but found they could do nothing, because the executions had the preference; that the slaves conveyed for the security of *Burwell*, were also advertised to be sold, and if the sales had then been made, the executions alone would not have

been satisfied; that *R. Boyd*, who went to Virginia with the defendant, returned and left him there to contest the matter; that he proposed to *Rainny* and the other trustees, in the deed of the 11th of June, to assign their legal title to him, *Hawkins*, to which the two *Boyds* assented, and the conveyance was made on the 8th of July; that in this state of things, for the purpose of averting an immediate sale, he purchased from *Brown*, on the 11th of July, his judgment, and took an assignment to his own use, by giving his own bond for the amount; that this purchase was made without consultation with *Boyd*, and being without any understanding for an indemnity, or any funds in hand, belonging either to *Boyd* or the trust, and when *Boyd* was believed to be insolvent, it was founded exclusively upon his own responsibility, and enured to his advantage. That under the executions a sale was made, at which *Hawkins*, acting by *R. Boyd* as his agent, purchased nearly all the property, to the amount of about $9,000;—that he refused to deliver the negroes conveyed to *Burwell*, until the crops were finished, and with those and his own purchases, he did finish the crops, after guarantying to the overseers their wages; that he then surrendered the negroes to *Burwell*, for which he had a deed; and that the property bought at execution sale, and the crops, upon a re-sale afterwards made, produced the sum of $17,855 94, besides a quantity retained by *Boyd*, and never resold, to the value of $4,257 99, making together $22,113 93.

The defendant insisted, that as the judgment was his, and the purchases his, he was entitled exclusively to all the profit; but admitted, that he told *R. Boyd* that altho' he had not acted as trustee in the purchases, he did not mean to speculate on his difficulties, for which great gratitude was expressed. It was further stated that *R. Boyd* owed large debts to several persons, secured by deeds of trust or judgments; among which was one to *Fitts* for $2,100: one to *Palmer* for $4,200: and one to *Cannon* for $800, and that *Boyd* was wholly unable to meet them and made no efforts to do so: that the last was satisfied by a bond of *Boyd* with *Hawkins*, as his

Dec. 1832.

Boyd v. Hawkins.

surety; the first by a sale of one of the tracts of land, conveyed in the deed of July 2nd, and a new bond of *Boyd* with *Hawkins*, as his surety: and that to *Palmer* by a sale of another tract of land conveyed in the same deed, which was not worth more than $1,500 but was taken in full satisfaction of the debt, from the apprehension of *Boyd's* insolvency: that these responsibilities were dangerous in the situation of *Boyd*, at that time, before any part of the debt to the bank was paid, and made it necessary for him to indemnify the other trustee, before he would join in conveying to the purchasers. The answer then proceeded, that *R. Boyd*, being impressed with the value of the defendant's services rendered, and those to be rendered, which would for a long time, cause the neglect of his own affairs; and especially in consideration that the defendant, after making the profitable speculation on *Brown's* judgment, had voluntarily given him the benefit of it, offered without persuasion and with a full knowledge of all the premises, to give to the defendant one-half of all the estates real and personal, which had been, or might be secured from *Alexander Boyd's* property—that the defendant refused that offer, but that afterwards on the 13th of September, 1824, the plaintiff, *Boyd*, after free consultation with his own friends, and in the absence of the defendant, executed and then delivered to *Hawkins* a deed, which was exhibited, and which secured to *Hawkins* one-fourth part of those estates of every kind; thereby adding the inducement of interest to excite the defendant to the greater activity: that *Boyd* never had pretended to the defendant personally, that he was in any manner deceived in the execution of the instrument; for he well knew that he had often offered more, and that under all the circumstance it was not more than adequate, and that he confirmed it by another deed on the 28th of October following, which was also exhibited. That the defendant, altho' entitled to retain one-fourth as the funds came in hand, yet, as *R. Boyd* was pressed by the Bank debt, had applied all his receipts to its satisfaction, and in so doing advanced what was his own, without even fully satisfying the bond debt

of *Brown*, on which there was a balance due of $ 1946 39. The answer proceeded to specify the lands and their value, amount of debts and effects obtained from *A. Boyd*, besides the chattels covered by the before mentioned executions, which amounted to the sum of $ 17,950 in value; of which the defendant claimed one-fourth: being an amount realised from the assignments of *A. Boyd* of $ 35,805 94; altho' it was deemed worthless when the defendant's trust commenced. It was further stated, that the defendant afterwards essentially served *R. Boyd* in effecting sales of portions of his lands in North-Carolina, by which he was enabled to discharge his debts, and save all his negroes, and one-half of his manor plantation, worth $ 25-000, altho' *Boyd* himself in his distresses, had offered to take $ 30,000 for the whole, which *Hawkins* refused to ratify, because he considered it far below the value, and believed he could himself get much more—that in making that sale and others, he was obliged to indemnify his co trustee, and also became responsible to other incumbrancers for sums, which had since been discharged by *Boyd*, or out of the trust funds. The answer proceeded to state, that after *R. Boyd's* affairs were thus rendered prosperous, a difference arose between him and the defendant, about the claims of the latter for commissions, advances, &c. and that the defendant rendered an account and demanded a balance of $ 8,494 34½, which *Boyd* refused to pay; and that the defendant advertised the sale, and brought the suit as charged in the bill, for the purpose of satisfying himself. The answer admitted the pendency of the suit in Virginia; in which the transactions in this state were embraced; but the defendant averred that he was not restrained by any order therein, from asserting his demands in this state, and insisted that the pendency of a suit in another state could not affect the jurisdiction here, between citizens of this state, and claimed the right of making a full defence, and setting up all his demands. The answer further stated that the first deed of the 2nd of July contained a clause allowing the trustees a reasonable compensation; and that it was omitted in the other

Dec. 1832.

Boyd v. Hawkins.

by accident, or because the interest was then thought too inconsiderable to require a stipulation. It was further stated that the defendant was prosecuting an action of ejectment in Warren, against *William Hunt* and *John C. Goode*, for a valuable tract of land, which those persons had purchased under execution, as the estate of *Alexander Boyd*, and which had been conveyed, as before mentioned, by *A. Boyd* to *Fitts* as trustee for *R. Boyd*; of which if recovered, the defendant also claimed one-fourth: the expenses of prosecuting this suit were charged in the general account against *R. Boyd*. The whole concluded by insisting that the defendant's attention had been faithfully bestowed for several years on the business of *R. Boyd*, to the injury of his own fortune; that he was entitled to liberal compensation; that the agreement for it was freely and fairly made; and that such an agreement to buy his efforts ought, upon their success, to be fully executed. To the answer were annexed detailed accounts, showing the plaintiff, *Boyd*, to be the debtor of the defendant for about the sum above mentioned, if the defendant was allowed credit for a share of the proceeds of *A. Boyd's* estate; but if he was not so allowed, the balance was on the other side: and also a list of *R. Boyd's* debts for his brother and on his own account, which in July 1824 amounted to $ 59,439. A general replication was put in to the answers.

There were numerous exhibits, among them the executions in Virginia, on which the sheriff had frequent sales from the 27th August, to the 20th September, 1824, of which the principal ones were on the 13th and 15th of the latter month. The deed of 13th September, was in the following words:

"The undersigned, *R. Boyd*, is bound to the State Bank of North-
"Carolina, as security for his brother, *Alexander Boyd*, to the amount
"of thirty-two thousand six hundred dollars, or thereabouts, and *Alex-*
"*ander Boyd* is indebted beside to *Richard Boyd* nearly nine thousand
"dollars individually; and to secure said *Richard Boyd* from the afore-
"said bank debt, as well as to pay him his private debt as aforesaid,
"*Alexander Boyd* has consented that a conveyance be made to *John*
"*D. Hawkins* and his heirs in trust, and who is the assignee (by the
"consent of the parties concerned) of *Philip Rainey* and others, the
"original trustees, of sundry property, including the growing crops, &c.

"as will better appear by referring to the deeds themselves of record "in Mecklenburg County. And whereas, by virtue of an execution at "the instance of *Thomas Brown*, of Granville County, N. Carolina, of "eight thousand dollars, or thereabouts, the negroes as well as other "property of *Alexander Boyd*, were taken by the sheriff of Mecklen- "burg into his custody to pay said *Brown's* debt, which would have "destroyed the crops of the said *Alexander Boyd*, and been attended "with great expense beside, in keeping the property at the sheriff's "house, and injury to said *Richard Boyd*, *for whose benefit* said pro- "perty was conveyed. And whereas, *John D. Hawkins*, in order to "benefit said *Richard Boyd*, purchased said judgment and execution, "and had the property to remain upon the plantations, but at the said "*Boyd's* risk, to advance the interest of the crops for the benefit of "said *Richard Boyd*; and whereas, said *Hawkins* has moreover by his "timely advances and exertions, in other respects prevented said "*Richard Boyd's* own estate from being sacrificed by *R. H. J.* who "was about to sell as trustee, for the benefit of *Henry Fitts*; and "whereas, said *Hawkins* has been at unusual trouble and disadvantage "in protecting the rights, credits and property of *Alexander Boyd* for "the benefit of said *Richard Boyd*, and also about the said *Richard* "*Boyd's* property generally, which was vitally exposed; and whereas, "*Alexander Boyd* conveyed by deed to *Henry Fitts*, in trust for the "benefit of *Richard Boyd* and *Francis A. Thornton*, to secure the pay- "ment of the aforesaid debts to the bank, and to *Richard Boyd*, a va- "riety of property, as will appear by reference to said deed of record "in the county of Warren, North-Carolina; and *Henry Fitts*, by the "consent of the parties, has assigned his powers, rights and authority "under the deed, to *John D. Hawkins* and his heirs, also in trust for "the same purpose; and in as much as the execution of this latter "trust will involve much litigation and trouble, all the property con- "veyed by it having been sold by execution, and all the other property "is more or less liable to legal difficulties and expense, which expense "in all cases respecting the property in question, and the business "attending it, said *Richard Boyd* is to pay, Now in consideration of "the premises and as well as that said *John D. Hawkins* is yet to be at "much trouble in executing the premises, I, *Richard Boyd*, do hereby "promise and agree to give said *Hawkins* twenty-five per cent. upon "all the proceeds from the sales of said *Alexander Boyd's* property, "which has been sold, and shall again be sold, and upon all sales "hereafter to be made for the benefit and protection of said *Richard* "*Boyd*, to satisfy said bank debt, and said *Richard Boyd's* private "claims as aforesaid; and said *Hawkins*, as trustee as aforesaid, is "hereby authorised to retain accordingly, for compensation in his own "hands. In witness, &c."

Two other agreements between *R. Boyd* and *Hawkins*, were also exhibited by the latter, dated the 25th of October, and the other the 7th day of December, 1824,

Dec. 1832.

BOYD v. HAWKINS.

whereby it was agreed, that all the property bought by *R. Boyd* as agent of *Hawkins* under the executions, and certain other of the estates of *A. Boyd*, which had been bought in, should be re-sold to the best advantage by *Hawkins* for the purpose of paying the debt to *Brown*, and then giving *Boyd* the surplus for the payment of his debt to the bank, *Boyd* being responsible for the forthcoming of the property for a re-sale.

There were many depositions, which are not material to the points on which the case was decided, except three. One of them was that of *J. W. Hawkins*, the brother-in-law of *Boyd*, and the brother of the defendant, taken by the latter, who proved *Boyd's* extreme distress upon the failure of his brother *Alexander*, and his expectation of being reduced to utter poverty; that he was extremely anxious to gain the favor and services of the defendant, and intreated the witness to intercede for him, and that *Boyd's* situation and wishes, were, by the witness, made known to the defendant, who was ultimately prevailed on to undertake the trust. This witness saw *Boyd* upon his return from his first visit with *Hawkins* to Mecklenburg, and learned from him, that he had fled to avoid being put in jail by his co-sureties, for the debt to *Brown*, and advised him to return, but he said he would not, for he thought nothing could be made of the wreck of *Alexander Boyd's* estate, and that he could be of no service, but would leave it to the defendant; that he further said, that he did not know what to do, for he could not go home, because a *ca. sa.* against him was in the hands of the sheriff of his own county. At a sale of *A. Boyd's* property, at a plantation called *Davis'*, (which the return of the sheriff on *Brown's* execution, showed was on the 1st of September,) *R. Boyd* told the witness, that his prospects brightened, and that the defendant would save him much more than he had expected, and talked of a re-sale. The witness said, that as he knew every thing rested on the defendant *Hawkins*, he enquired the terms on which he was to manage the business; to which *Boyd* replied, that he should have his own asking, if it were half, for he could not do without him, and rea-

dily agreed. upon the suggestion that half was too much, to give one fourth. He shortly afterwards heard *Boyd* say, that *A. Boyd's* property would yield but little, that he had come to the determination, to give up all chances of gain from it, to the defendant, and after satisfying some executions, sell his own property, and particularly his land, at $25,000, pay his debts, and move away. This witness further proved, that the defendant was engaged the greater part of his time, until the latter part of 1826, in the execution of the trust, and that *R. Boyd* declared his own embarrassments to be such, that he gave up the entire management to the defendant, whose exertions had saved him from bankruptcy.

The second deposition was that of *P. R. Burwell*, of Virginia, who stated, that the defendant had told him that he had reconciled an old difference with *R. Boyd*, and had agreed to manage his affairs, as he viewed himto be incompetent and almost deranged, and that *A. Boyd's* other creditors must not blame him for any thing he did, as he acted without fee or reward; the witness replied, that it was surmised otherwise, and that his object was said to be to get *Boyd* in bonds, and secure to himself all the advantages of the wreck of *A. Boyd's* property; which the defendant desired him to contradict, as he intended to make no charge, except for his expenses.

The deposition of Mr. *Young*, the subscribing witness to the deed of 13th September, stated, that *R. Boyd* brought the agreement to him, in the court-house yard, at Mecklenburg already signed, and requested him to witness it, which he did; and that *Boyd* seemed not to be dissatisfied with it, and altho' in private, expressed no reluctance in executing it, but seemed to do it freely. No parrticulars of the conversation were given.

The agreement was admitted to have been drawn up by *Hawkins* himself, and appeared from the ink, to have been written at a different time from that of its execution. It was also admitted, that Mr. *Young* married the daughter of *Hawkins*, and the niece of *Boyd*.

Upon the coming in of the answers, an order was made for a dissolution of the injunction, unless the plaintiff

Dec. 1832.

Boyd v. Hawkins.

should pay certain sums alleged to be due to *Brown*, for which *Hawkins* continued responsible; and under that order, he paid into court the sum of $1,930 48 on the 19th of May, 1829, and $79 67, on the 8th of July, 1829.

By an order in the cause, the master was directed to take an account of all the transactions, upon the trusts in both states, and of *Hawkins'* responsibilities for *Boyd*. A report was made, in which the master allowed the defendant *Hawkins* the full benefit of the agreement of September 13th, and also the sum of $782 77 by way of commissions at 3 per cent. on the sales of property in this state, and payments made to the bank; the effect was to give to *Hawkins*, for the execution of all the trusts including interest, the sum of $10,036 10 and to leave a balance due to him of $7,026 03. All the expenses of every kind, including those of finishing the crops, and getting them to market, and of law suits, amounting to about $2,500, were charged to *Boyd*: as was also the sums paid on the debt to *Brown*. So that the fourth part assigned to *Hawkins* was of the gross proceeds on a re-sale, or of the value of such parts as had not been re-sold, of all the estates obtained under the assignment of *A. Boyd*. If the claim of the defendant *Hawkins* under the deed of September 13th was not sustained, then by the accounts stated by the master he would have in his hands, the sum of $2505 16, as a balance for receipts on re-sales of the property bought under the executions, and the crops in Virginia, after allowing all expenses and payments thereout to the bank and others, on account of *R. Boyd*, and also the further sum of $400 for the price of negro *Patty*, and a surcharge in account making together, the sum of $2,905 16 besides interest thereon, due to *R. Boyd*. This did not include the sums paid under the interlocutory order, because they went in satisfaction of the balance due to *Brown*, which balance the master had no where charged in the accounts to the plaintiff.

To the report the defendant *Hawkins* excepted, because the allowance of $782 77 as a commission of 3 per cent.

on the payment to the bank was too small. The plaintiff also took numerous exceptions; the first of which was against any allowance of credits to *Hawkins*, founded upon the deed of September 18th, and the others because, if any should be made, the allowances were too large, and extended to property to which it was contended, the deed did not relate.

The *Attorney-General* and *Devereux*, for the plaintiff.

Gaston, *Badger* and *W. H. Haywood*, for the defendant.

RUFFIN, Judge, after stating the case as above, proceeded as follows:

From the shape of the pleadings in this case, the principal question arises upon the first exception of the plaintiff's to the master's report. That question is as to the validity of the deed of September 18th, 1824, which is brought forward in the answer of the defendant, *Hawkins*.

To prevent frauds, courts of equity do not permit trustees to purchase the trust estate at their own sales.

The well established principle of equity, which has been repeatedly recognised by the courts of this state, is that a trustee cannot purchase the trust property directly or indirectly, at a sale made by himself, either privately or by auction. It is founded on the notion, that it exposes him to temptation, and the *cestui que trust* to imposition. Although no actual fraud be proved, the contract is invalid by reason of the danger of fraud. The same policy forbids a trustee from dealing in incumbrances on the trust estates. His situation opens sources of information to him, of the value of the estate, the necessities of his *cestui que trust*, and his capacity for encountering difficulties and clearing away the incumbrances, or his disposition to submit to hard terms for obtaining indulgence, or making satisfaction of them. Besides most commonly, the trustee has in his own hands the funds, out of which they are to be satisfied, and the profit which is made on such purchases, should enure to the owner of the fund, which in fact causes the gain. A familiar instance of this is the purchase of a debt of the testator by the executor; he can hold it as a security only for what he paid; and this as well against creditors,

The rule also forbids a trustee from purchasing for his own benefit, an incumbrance on the trust estate.

Dec. 1832.

Boyd v. Hawkins.

as legatees. This principle has been extended to every case which comes within the reason of it, and to all persons standing in a confidential relation to the fund. He, who by contract, or the course of this court, is charged with the interests of others, and therefore bound to protect and advance them as far as he honestly can, shall not be allowed to speculate either upon those interests, or in any thing else, at their expense. Hence, solicitors, agents, stewards, and guardians, as being in the nature of trustees, are forbidden, as well as executors and express trustees, from buying the estate, or buying for their own benefit, any charge upon it. This doctrine is so well settled, as to need no reference to authority.

And it extends to all persons standing in a fiduciary relation to the estate.

The prohibition of the trustee to purchase from the *cestui que trust* himself, is not found to be so absolute. There are cases in which contracts between them have been supported. But the same danger that has induced courts to declare their transactions of the nature just mentioned to be void, has imposed restrictions upon the power of contracting with the *cestui que trust*, which, in effect, almost extinguishes it. Bargains between them are viewed with anxious jealousy. It must appear, that the relation has ceased, at least that all necessity for activity in the trust has terminated, so that the trustee and *cestui que trust* are two persons, each at liberty, without the concurrence of the other, to consult his own interest, and capable of vindicating it; or that there was a contract definitively made, the terms and effect of which were clearly understood, and that there was no fraud or misapprehension, and no advantage taken by the trustee, of the distresses or ignorance of the other party. The purchase must also be fair and reasonable. (*Coles* v. *Trecotrick*. 9 *Ves*. 246. *Fox* v. *Macreath*, 2 *Bro. C. C.* 400.) These cases are not allowed to turn on nice enquiries, whether it might not possibly be for the benefit of the *cestui que trust* to make that particular contract rather than none at all; but when there is a fair judicial doubt, as some of the cases express it, whether the trustee has not availed himself of his confidential situation to obtain selfish advantages,

Bargains between trustee & *cestui que trust*, are not void—but they are viewed with great jealousy.

If they result from the connexion, they cannot be sustained.

the contract cannot stand. (*Ormond* v. *Hutchinson*, 16 *Ves.* 107.) In other cases the chancellors have said, that the trustee must shew demonstratively, that he had given the *cestui que trust* the advice he ought were a third person in treaty; that he dealt with himself as he would with a third person, and did not take a bargain, which he would not have advised his *cestui que trust* to make with another, or it cannot be supported. *Dunbar* v. *Tredennick*, 2 *Ball. & Beat.* 314.) Were it to appear, that the transaction was the effect of the free and uninfluenced judgment of the principal or *cestui que trust*, with a perfect knowledge of all the circumstances and consequences, gained from the communications of the agent, yet it will remain to inquire how that judgment and intention were produced, and whether it was not the effect of pecuniary necessity, of the knowledge of which the trustee was availing himself. (*Hugonin* v. *Basely*, 14, *Ves.* 300.) When it is said therefore, that a contract between the trustee and *cestui que trust* is not *per se* void, but may be made under these restrictions; it is hardly taking a step. For it is requiring us to change our natures. It is telling man that he must go out of himself, and in making a bargain must gain nothing, which amounts nearly to a total prohibition. Yet less would certainly not do; for it would leave the helpless a prey to those whose duty it was to protect them.

If a sale by *cestui que trust* to trustee be the effect of the unbiassed judgment of the former, it must appear how this judgment was produced, and whether by pecuniary distress of which the trustee availed himself.

There will, with the aid of these authorities, be little hesitation in the mind of any, how the court is obliged to deal with the contract in question. The defendant by the deed of 2nd of July, became the assignee for *Richard Boyd*, of the security created for him by his brother, in the deed to *Rainny* of the 11th of June preceding.—On the 8th of July, upon the defendant's own proposition, he was also invested with the legal title in those estates, by a deed from *Rainny* in which the *Boyds* joined. He says he accepted this last trust, because *R. Boyd* was altogether unable to manage his own interests, had no credit, and had left the county of Mecklenburg, or, as *J. H. Hawkins* proves, had fled in dismay: and because great energy was required to conduct it, which the ori-

Dec. 1832.

Boyd v. Hawkins.

ginal trustees would not exert. *Hawkins* then understood perfectly, when he assumed this relation to the plaintiff, the nature of the task he imposed on himself; and indeed the vast importance to *Boyd* of a correct discharge of them formed, he says, his inducement. When the agreement of September 13th was entered into, those functions had not been performed; they were in the height of their execution. The answer itself, states that the object of *Boyd* in executing it, was to add the inducement of interest, to excite the defendant to greater activity. In another part, to buy his efforts. No price is given by *Hawkins* but those efforts; none else pretended in the deed itself, throughout its long recital, except the purchase of *Brown's* judgment. So far then, was this contract for one-fourth of the trust fund from being made by a trustee, after the trust had been executed, or who had in this purchase, divested himself of the character of trustee, that the purpose and consideration of it, was to get the trustee to go on, and execute the trusts undertaken by him. Can a court of justice permit a man who has become a trustee, and in that character caused various other conveyances to be made to him, so that the titles to very large estates, and all the estates of his *cestui que trust* are concentred in him, and within his power, then to say to his *cestui que trust*, you shall give me a fourth part of the whole, or I will proceed no farther? But this is not an ordinary trust, where the whole interest was in *Boyd*, so that he might call upon *Hawkins* to convey to him, or to another trustee: it was not a nominal estate for the use of *Boyd* merely. *Hawkins* was not only *Boyd's* trustee, but that of the bank also, and charged with its interest, and *Boyd* could not remove him without a dilatory litigation, which would have exposed him to ruin. Can such a trustee avail himself of his advantages of trustee, and superadd thereto the powers and influence of the creditor, and demand such a conveyance as the price of his aid, either in the way of services or mercy? Can it be permitted that a trustee should derive any benefit from such a conveyance, made by his

A sale by the *cestui que trust* to the trustee, made while the connexion existed, the consideration of which was a discharge of duty by the trustee, cannot be supported.

Especially where the trustee was one for sale, imposed upon the *cestui que trust* by his creditor, having all the influence of the latter.

cestui que trust in distress, embarrassed, incompetent to business, apprehensive of great loss, and of eventual insolvency, when he was confiding in the friendship and ability of the trustee—and moreover ignorant of the value of what he was giving? If it could be sustained, there are no checks worth regarding, to the unlimited demands of those who have the care of other's affairs, even should their situation also give them power over them. The value of these estates, as claimed by the defendant, was in truth near $40,000; they realized that sum in about two years. Did *Boyd* have any just information upon that subject? So little did he know, or so incapable was he of judging, that the defendant himself says it was much doubted by *Boyd*, whether they were worth pursuing; and at one time, he told *J. W. Hawkins* he would give all up, and rely on his own estate; and at another, expressed great expectations. Such was the state of his mind, that it is obvious he threw himself into the custody and ward of the defendant, and was ready to do whatever he was required, or whatever he thought would be deemed a compensation, for the magnified services of his friend. He offered one half. Why did not *Hawkins* take that? It would have had the same ground to stand on, which this has, the offer and willingness of *Boyd*. The answer does not state the reason, but leaves us to infer that it was either generously declined, altho' merited, or that it was deemed too large, and that the defendant was only willing to receive adequate remuneration. But upon the score of contract, each would have been alike obligatory, and each is open to be impeached upon the ground of unfairness, unreasonableness, and advantage taken by one man, of another in his power.

And where the *cestui que trust* was ignorant of the value of the estate sold in distress, and confided in the friendship of the trustee.

But it has been insisted, that trustees are in this state entitled to compensation, and as none was provided for by the deed, it was a fair subject of treaty and adjustment, and in that light, good. The court does not understand that trustees are entitled to have more than their expenses. The contrary, is the old rule of the court of equity; and no opinion has been given against it in this

In this state, trustees are entitled to nothing but their expenses.

Dec. 1832.

Boyd v. Hawkins.

state, as far as we know. Nor does the court see a reason to adopt a new rule. As far as the operation of the statutes allowing compensation to administrators and guardians, has been observed, it is thought far from being salutary. It makes those offices objects sought after and contested for; and it requires the courts to hold persons in those trusts, to stricter account. If it be established that a trustee is entitled to compensation, it follows that *bona fides* will not excuse him, but he must answer for his acts as a paid man, and such changes we are not prepared to make. The farthest we can go is, to permit a stipulation for compensation at the contracting of the relation; and then, not in a case, where the trustee to sell, is imposed on the debtor. If it be arranged pending the trust, it can only be taken as evidence that the parties did not intend gratuitous service, and the measure will be disregarded, and fixed at what is deemed reasonable by the court. Any other doctrine, would subvert the whole law of this court, upon contracts between these parties; for instead of buying, the trustee would take what he pleased of the estate, without price, under the name of compensation, and every abuse would follow. The case in this respect then, stands on the fairness of the measure of compensation; and upon that there cannot be a moment's doubt, when it is seen to be near $ 10,000, for a portion of two year's attention, without the defendant being one cent out of pocket, or risking one penny of his money. Instead of serving this distressed man, it would be plundering him, as by the terms of the agreement, the defendant is to have one fourth of the gross estate. Every expense is to be borne by *Boyd*, even that of carrying the crop to market, altho' *Hawkins* shares in the increased price; and *Brown's* judgment is to be paid by *Boyd* out of his residue. Thus *Boyd's* interest is to satisfy incumbrances to the amount of eleven or twelve thousand dollars, and *Hawkins* none; which, in effect, nearly gives the latter the half, which his own conscience had once rejected.

A stipulation for compensation made when the relation was contracted, will be supported unless the trustee be one for sale, nominated by the creditor.

If subsequently arranged, it is only evidence that gratuitous services were not intended, & will not be regarded as a measure for its allowance.

But it is not true, that this was an adjustment of compensation for services. It is true, that it was an arrange-

ment to determine *Hawkins'* gains, and that they are called compensation in the agreement. But services under the deed were not alone, or principally, in the contemplation of the parties. They are anxiously recited in the deed, and in a way to magnify them. But the principal service then claimed, and that which prevailed on *Boyd* to make such astonishing offers to the defendant, was the purchase of *Brown's* judgment and giving up the benefit of it to *Boyd*. The answer claims the exclusive ownership of it to be in the defendant; because he says he bought it with his own money, and without advice or indemnity from *Boyd*, or having any of his funds. This may be true in fact, but in this court, the purchase of the judgment enured to the benefit of the fund, which was bound, and was sufficient to discharge it. That judgment belonged to *Boyd* the instant *Hawkins* purchased it, and stood only as a security to him for what he gave for it. What did he give? Not a cent of his own money, but his bond, which has been satisfied out of the trust fund, or by *Boyd*. *Hawkins* has never paid any thing out of his own pocket, never been in advance for *Boyd*; not even as alleged in his answer, except as it is therein stated, that he advanced that which belonged to him under this very agreement, which, in that sense, he calls his own. Nor did he incur any responsibility; for the judgment was against the two *Boyds* and three others, and execution was actually levied on much more than satisfied it, and ultimately yielded upwards of $17,000. This extra service in buying, and extra kindness in transferring the benefit of the judgment, (which here is taken to be but the discharge of a known duty,) is exaggerated in the instrument itself, into a principal reason, why *Boyd* should give the other a fourth of the estate, and out of the residue pay the judgment itself, and all the expense of securing the whole. That such is the true character of the transaction, is deducible, not only from its face and circumstances, but it is expressly admitted in the answer, that *Boyd* executed it "*especially* in consideration that the "defendant, after making the profitable speculation on

The purchaser by a trustee of an incumbrance upon the trust estate, enures to the benefit of *cestui que trust*, & a sale of one-fourth of the estate, in consideration that the trustee will surrender the judgment, is made by *cestui que trust*, in ignorance of his right.

Dec. 1832.

Boyd v. Hawkins.

"*Brown's* judgment, had *voluntarily* given *Boyd* the "benefit of it." Can one doubt, either that *Boyd* was altogether deluded into the belief that the judgment really was the property of *Hawkins*, and not his own, or that knowing it to be his, he was constrained to treat it as *Hawkins'*, from the apprehension that a person who put up such a claim, and had him in his power, would use that power so as to serve himself as effectually in some other way?

As to the other responsibilities incurred by *Hawkins*, in becoming the surety of *Boyd*, and indemnifying his co-trustee, they are perfectly imaginary; *R. Boyd's* own estate was, and has been, proved to be an ample counter security, without any aid from *Alexander's*. Every responsibility is discharged, and eighty negroes and half of his Roanoke estate left; and although it be said that at that time he was willing to take half price for it, and expected insolvency in that event, yet his willingness to make that sacrifice, is no very satisfactory evidence that he was capable or careful, in dealing with his own trustee, for the uncertain interests under his brother's assignments. The very facts, that from his want of judgment, or his agitations and distresses, he estimated his own resources so inadequately, and exaggerated so greatly the responsibilities incurred for him by the defendant, or from the same causes, that the services of the defendant were really indispensable to *Boyd*; he being incompetent to the management of such ordinary concerns, though sustained by his large means; made it unconscientious and inequitable, according to the rule of this court, to exact or to receive such a donation from him. Accordingly, we find it stated in the answer by way of reproach to *Boyd*, that as soon as his affairs became prosperous, he refused to comply with the demand of *Hawkins*; in plain words, when he became able to think for himself, and got clear of the terror of his trustee, and of insolvency, he was sensible of the enormity of the exactions, and resisted them, although he offered, and now submits to do, whatever may be thought reasonable.

The conclusion of the court is, that regarding the relation of the parties, the considerations moving them, and the purposes in view, the actual pecuniary difficulties of *Boyd*, magnified by his alarm, his ignorance of his rights, or his constraint from asserting them, and the extravagant estimates of the services and responsibilities of the defendant *Hawkins*, and exorbitant claim of compensation for them, the agreement of 18th of September cannot be treated here as obligatory, and as a discharge of *Hawkins* from accounting for the trust fund, or to found any charge on his part against *Boyd*.

And such a sale made when the *cestui que trust* was in pecuniary distress, fearful of the sinister influence of the trustee, & under mistaken estimates of his services, cannot be supported.

As to the idea of a confirmation by the deeds executed in October and December, it will not bear stating. The confirmation is not direct, but only by inference. But if it were, the same objections existed then to such a contract, as did in September. And to make an express confirmation of a void contract avail any thing, it surely must appear that the party was then aware of his rights, and knew the first transaction, at least was impeachable, and meant to make that valid, which he did not before consider so. In any other sense the new deed is but a new imposition. (*Lord Chesterfield* v. *Jansen*, 2 *Ves.* 146.)

And a subsequent deed will not help it, unless the *cestui que trust* knew that the first was invalid, and intended the second as a confirmation.

It has been, however, strongly urged, that the validity of the agreement is not in issue; because it is not impeached in the bill, and therefore that the sole question is, as to its execution. It is certainly true that no decree can be founded on a fact not in issue; and that generally, it is safest to bring forward in the bill, all matters in avoidance of a deed which the defendant means to use. It formerly was the course to do it by a special replication, but in more modern times the practice is, to charge the facts in the bill originally, or to do it by amendment, which the court always allows, when the deed is first stated in the answer, without its attending circumstances. If a release be barely pleaded or stated in the answer, and relied on simply as a release, it cannot be impeached by collateral matter, as having been unfairly obtained. So in the case of *James* v. *McKernon*, (6 *John. Rep.* 543) cited for the defendant, where the defendant re-

Where a deed is pleaded, or only stated in the answer as a bar to the relief, without having been mentioned in

Dec. 1832.

Boyd v. Hawkins.

lied in his answer, on the agreement as such, upon the mere fact of existence and its import, and there was nothing on the face of it, to invalidate it, it was properly held that evidence could not be heard to impeach it, upon the ground that it was obtained by fraudulent misrepresentations, or was otherwise unconscientious. Neither the bill nor the answer contained any matter to which the proof was applicable, and therefore it would be a surprise to the other party, and the witnesses not guilty of perjury if they swore falsely. But it is not necessary that the facts upon which the validity of the deed depend, should be put in issue in any particular part of the pleadings, as in the bill, or by a special replication. It is sufficient if the issue is formed any where in the record. If the answer state the deed not only as existing, but also the circumstances which are relied on as giving it validity, and insist upon it as a fair deed freely given, claiming the benefit of it as an executory agreement, which the court ought to execute by reason of the considerations upon which it is alleged to have been founded, and the purposes for which it was given; if also the deed be exhibited with, and made a part of the answer, and upon its face contains recitals, which were meant to give a colour to and sustain it; moreover, if the defendant sets up under this deed, not a discharge barely, but a satisfaction of the demands made on him in the bill, and also an original charge against the plaintiff: surely, a general replication to the answer puts in issue, as directly as can be, every circumstance specially stated in support of the deed, the general affirmations that it was fair and voluntary, and also the facts recited in the deed itself. All this is necessarily as much in issue by a general denial of the truth of all that is in the answer, as is the execution of the deed. In the present case no fact is in proof, which does not directly admit or deny some allegation of the answer: and the defendant himself insists in the answer, that the cause shall be tried on the merits, and he assisted upon the footing of the agreement being valid under the circumstances disclosed by him.

the bill, the replication puts only its execution in issue, and it cannot be impeached by proof of collateral facts.

But it is otherwise where the deed with all its attending circumstances, is set forth in the answer, and is made the foundation of a charge against the plaintiff.

But there is in truth no necessity of resorting to testimony for the ground on which the court decreed.—The matters are confessed in the answer, and the plaintiff, as to the operation of that deed, might have set down the case on the bill and answer, and so the objection of surprise cannot arise. It is like a defendant claiming a set off upon a bond admitted in the answer, or stated on its face to be usurious. The court could not decree in favor of it, if the other party objected; and so here the defendant can found no claim on this instrument. It is true it cannot be declared void and ordered to be given up; but that is not because it is not in issue, but because the plaintiff has not in any part of his pleading asked such relief against it. It is simply repelled here. The case is like the common one of a vendor bringing a bill against a purchaser for specific performance, which the court refuses on equitable circumstances, but cannot cancel the articles, until the purchaser files his bill for that purpose. The court must therefore allow the complainant's exception, to so much of the report as is founded on the interests supposed to be derived by *Hawkins* under this agreement.

At the hearing a deed thus bro't forward is not decreed to be cancelled, because relief of that kind is not sought, not because it was not in issue.

The question remains, what decree the complainant is entitled to? The bill is confined in its charges to the deed of trust for *Boyd's* estates in North-Carolina, and sets out as a reason for not charging any matter relating to the Virginia deed, that a suit is pending in that state for an account under it. But the bill prays for a conveyance of the North-Carolina property and for general relief. This prayer necessarily involves a general account of the whole trust fund; because the plaintiff cannot have even the specific relief prayed for, until all the debts are paid, and his trustees indemnified upon the whole transaction, as they had a right to look to all parts of the property for their outlays, as well as for the debt to the bank. Such an account has been taken; and the defendant insists in his answer upon a full account, and that the whole controversy ought to be settled here, notwithstanding the suit in Virginia. The pendency of that suit is not considered an obstacle to a full investigation here, as it does not appear

Dec. 1832.

Boyd v. Hawkins.

that any rights have been determined in it; for the decrees cannot come in conflict, and the parties here being under the control of this court, can be made to dispose of that suit as may be deemed right. Both cannot be carried on together, and the court would put the parties to an election, if they had not already made one; the defendant in his answer, and the plaintiff by asking for a general account, and bringing this cause to a hearing upon the whole merits. Besides, the plaintiffs *Thornton* and *Davison* are not parties to the suit in Virginia, and have no rights in the fund in litigation there, but are subsequent mortgagees of the North-Carolina property conveyed in the first deed of 2nd July; and they have a right to a conveyance, if it appear that upon taking the accounts, all the prior incumbrances upon it are discharged.

A doubt has been entertained by the court, upon the propriety of making a decree in favour of *R. Boyd* alone, for the balance appearing by the accounts to be due to him; which arises from the silence of the bill respecting the assignments of *Alexander Boyd*, and the re-assignment thereof by *R. Boyd*, out of which grew the principal part of the funds in the defendant's hands. But it does not appear by any proof, nor by the full statement of all the transactions given in the answer, that any part of that trust property remains specifically, or that the titles of it, if there be such, are now vested in *Hawkins*, or that *Boyd* has any ground of relief against him touching it; or *Hawkins* a demand on his part in respect of it, except that set up under the agreement, which has not been sanctioned by the court. It results that no controversy exists upon that subject, but that involved in the accounts of the receipts, disbursements and charges of the trustees. Those accounts have been taken in this cause, and were necessarily taken; no objection is perceived in this state of the case, to proceeding to a final decree upon the whole merits, care being taken to prevent the parties from further harassing each other in Virginia, by an order on them to dismiss that suit, which must be at the costs of the plaintiff, whose fault it was,

not to include all the subjects in one bill; and care being further taken by an order to that effect, that this decree shall not prejudice any other suit by *Boyd*, or of an amendment to his present one, if he chooses it, by which he may seek a conveyance of the legal title of any property vested in *Hawkins* and *Robards*, or either of them, by any of the conveyances mentioned in the pleadings, or the exhibits; or by which he may seek to have the agreement of September 13th, 1824, declared void and cancelled. It is the object of the court not to conclude any of the parties as to the matters not fully tried and determined in this suit; and it is equally our object finally to settle all the matters of controversy, of which the merits are fully before us. Such is the fact in relation to the balance of monies arising out of the whole trust. The creditor is satisfied, and admits it by answer; the defendant *Robards*, never has set up any demand, and disclaims it in his answer; the defendant *Hawkins*, has rendered an account current of his whole trust, and detailed statements of it have been reported by the master, including even the expenses of the suits with *Hunt* and *Goode*, to no part of which has he excepted, save that of the allowance of commissions on the payments to the bank; and no exception is taken by *Boyd* to any omission by the master to charge *Hawkins*, but only to some of his credits. It must be assumed then, that the matter of account need not be longer kept open, and may now be finally adjusted upon the basis of the report, as corrected by the court, in the decree; and therefore, that it is proper that the cause should now proceed to a decree on that part of it.

By the report, the sum of $2,905 16 appears (after disallowing the claims under the deed of September 13th,) to be in the hands of the defendant *Hawkins*, and to have been there, or nearly all of it since the year 1825; and but few disbursements have been made since 1826. For this sum therefore, and interest on it, *Hawkins* is the debtor of *Boyd*, subject to such deductions as shall be made for his compensation.

Dec. 1832.

Boyd v. Hawkins.

Upon this subject we have had some difficulty. It is not thought justifiable to allow any thing as a commission; because if a trustee can receive compensation at all, it must be for his actual time and labor, and not by any arbitrary rule of commission, if not specified from the first. For this reason, the seventh exception of the plaintiff to the allowance for the sales of the North-Carolina property, is sustained, and the defendant's overruled. But the opinion of the court is, that *Hawkins* is entitled in this case, to compensation for his time and labor, as well as the expenses with which he has been credited. This opinion has been founded upon the clear understanding at the origin of the business, that he should receive it; for which there is a stipulation in one of the deeds, and upon the express submission in the bill to allow a reasonable compensation. The trust was troublesome and at a distance from the residence of the parties; it required an active agent to manage it; and *Boyd* seemed to have had more confidence in the zeal and skill of this gentleman than any other, and probably would have been unwilling that *Hawkins* should, as he had a right to do, substitute the services of another agent for his own. The duties expected, nay required, were beyond the ordinary ones of a trustee, and involved the necessity of personal interposition, in instances when perhaps no other agent could have served the same purpose. In general, the trustee can act by an agent; and it is best he should, because he will be under no temptation to pay him too much, though he is under the strongest to demand it for himself. But where that would not answer the purposes of the trust, nor satisfy the *cestui que trust*, and the trustee has been faithful, and the *cestui que trust* submits to what is reasonable, the court does not think it an improper precedent, to allow what the trustee might have fairly given to another competent person. In this case we think $750 per annum would have engaged such an agent, for the parts of the two years, during which *Hawkins* was actually occupied in this business; and the court allows the sum, namely $1,500 in the whole, by way of remuneration

for all his services touching the whole trust. For the residue of the $2905 16, and for all the costs of this suit, there must be a decree in favor of the plaintiff *Boyd*.

PER CURIAM.—DECREE ACCORDINGLY.

LEWIS TAYLOR v. ARCHER CAWTHORNE.

Testimony in a suit in equity, must be reduced to writing, and if a party upon a reference to the clerk examine witnesses *viva voce*, instead of taking their depositions, he must pay the costs of their attendance.

This was a bill originally filed in the court of equity for the county of Granville, for the purpose of having an account of a partnership business. The usual reference was made to the clerk and master of Granville court of equity, and a report made, which was, after the removal of the cause, set aside by consent, and another reference made to the clerk of this court, whose report was in every respect favorable to the plaintiff, and no exceptions were taken by the defendant.

Devereux, for the plaintiff, moved upon the circumstances stated by RUFFIN, Judge, in delivering the opinion of the court, that the defendant should pay the plaintiff his costs, and that the clerk in taxing them. should be directed to include the costs of witnesses who were examined before him.

Nash, Badger and *W. H. Haywood, contra.*

RUFFIN, Judge, after stating the substance of the motion, proceeded as follows: The court of equity requires all proofs to be in writing, for the purpose of allowing the judge full time for deliberation, and in order to give the parties the benefit of a bill of review, or an appeal to correct errors—the only exception relates to the execution of an exhibit, or the like. This is also the regular method of taking testimony to be read before the master. There is no rule that he shall not hear *viva voce* evidence, but

Dec. 1832.

FLEETWOOD v. FLEETWOOD.

only that he shall not act on any not reduced to writing; in order that the ground of his decision may be brought fully before the court. If a party then, for his own convenience or benefit, brings his witnesses before the master, instead of taking their depositions under a commission, he must bear the expense himself. The direction is therefore refused.

The report made by the clerk and master in Granville, having been set aside in this court, by consent of the parties, the allowance for making it must, for that reason, be paid equally by the plaintiff and defendant.

The costs of a suit to settle a partnership, are generally charged upon the partnership effects; but improper conduct in one of the partners, may be punished by taxing him with them.

In general, the costs of a suit to settle a partnership, are to be paid out of the fund, or by the partners equally. But the conduct of the defendant subjects him exclusively to the costs. He was the acting partner, and failed to keep and render proper accounts. He made payments to the plaintiff of part of his share of the profits, but took notes for the sums as advances made by him, and commenced suits at law on them, when he owed the plaintiff a large balance over and above the amount of those notes. He has moreover deluded the plaintiff and the court, by depositing with the clerk documents pretended to be evidences of uncollected partnership debts, due in distant parts of the country, and has caused a receiver to be appointed, who reports, that after taking a long journey, he has been unable to find or hear any thing of such debtors, and has reason to believe that the claims are altogether feigned. Such conduct meets only with a small portion of the rebuke it merits, when it incurs the penalty of the costs of suit.

PER CURIAM.—DECREE ACCORDINGLY.

SARAH A. FLEETWOOD *et al. v.* JOS. FLEETWOOD *et al.*

Bequest of negroes, to be divided between the children of A, when one of them arrives at the age of sixteen: *Held*, that children born after the death of the testator, but before the time of division, are entitled to a share.

This was an appeal from a decree of DONNELL, Judge, pronounced at Perquimans, on the last circuit.

The facts were, that *George B. Newbern* made his last will on the 20th of September, 1824, in which he bequeathed as follows: "I give my negroes to be equally "divided, when *Sarah A. Fleetwood* arrives to sixteen "years, between *Parthenia Fleetwood's* children." At the date of the will, *Parthenia Fleetwood* had four children, who are the plaintiffs. After the death of the testator, but before *Sarah A. Fleetwood* arrived at the age of sixteen, *Parthenia Fleetwood* had two other children, who are the defendants. And the only question was, whether the slaves were to be divided among all the children, or between those only who were born at the death of the testator.

His Honor directed the division to be made between all the children, and the plaintiffs appealed.

No counsel appeared for either party.

DANIEL, Judge, after stating the case, proceeded: Where a legacy is given to a class of individuals, as to children, in general terms, and no period is appointed for its distribution, it is due at the death of the testator. The payment of it being postponed for one year after that event, only for the convenience of the executor, in administering the assets; the rights of legatees are determined at the testator's decease. (*Crone* v. *Odell*, 1 *Ball & Beatty*, 459.) Upon this principle, is founded the well established rule, that children in existence at that period, or legally considered so to be, are alone entitled to participate in the legacy.

A legacy to a class of persons, without any time fixed for its division, is to be divided among the legatees in esse at the testator's death.

It is now also settled, that when legacies are given to a class of individuals generally, payable at a future period, as to the children of B, when the youngest shall attain the age of twenty-one; or to be divided among them upon the death of C, any child who can entitle itself under the description, at the time when the fund is to be divided, may claim a share, viz: as well children living at the period of the distribution, although not born till after the testator's death, as those born before, and living at the happening of the event. This rule is founded upon the anxiety of a court of equity to effectuate the intention

Dec. 1832.

Tate
v.
Conner et al

of testators, in providing for as many children as possible. It therefore does not unalterably confine the number to the time when the interests vest, which in general is at the death of the testator, but prolongs the period to the happening of an event upon which a determinate share of the fund becomes payable. (*Andrews* v. *Partington*, 3 *Bro.* 402. *Vanhook* v. *Roper*, 1 *Mur.* 178.) All the children of *Parthenia Fleetwood*, that were in existence, or legally considered so to be, (as a child *in ventre sa mere*,) when *Sarah Ann Fleetwood*, arrived at the age of sixteen years, are entitled to a share of the slaves bequeathed in the will of *George B. Newbern*. The decree made in the court below, was correct, and is affirmed.

PER CURIAM.—DECREE AFFIRMED.

MARY TATE v. CHAS. D. CONNER & ALFRED KERR *et al.*

A delay of thirty four years after a contract for the sale of land, without any claim on it, is a bar to a bill for its specific performance, where the delay is not accounted for by reason of infancy, coverture or the like.

The bill was filed in September 1820, and alleged that *James Kerr* on the 2d of May 1786, entered into a written contract with *W. Bowman* for the sale, at the price of £100, of 4500 acres of land, lying in what is now the state of Tennessee, and which was described as one half of an entry made by *Isaac Taylor* and *Kerr*, for 9,000 acres, situate on the third little Chickasaw bluff on the Mississippi river, and that the said *Kerr* thereby bound himself to convey the said land, as soon as a grant for it should be obtained; that *Bowman* died without issue, leaving the plaintiff, then an infant, his heir at law, she being the only child of a brother who died before him; that during her infancy, the plaintiff married, and remained covert, until the year 1817. The plaintiff then averred, that a grant for the same land issued to *Andrew Kerr*,

the brother of *James*, who was also dead, having by his will declared, that he held the land in trust for *James*; that *James* was also dead, and that administration upon his estate had been committed to the defendants *Conner* and *Kerr*. The heirs of both *James* and *Andrew Kerr* were also made defendants. The prayer was, that the contract might be specifically performed, or that the plaintiff might recover the value of the land, at some period after the time, when *James Kerr* might have had it located.

The defendants, by their answers, admitted that a grant issued in the year 1786, to *Andrew Kerr* for 5,000 acres; but averred, that it was situated on the Tennessee river, and not on the Mississippi, and they for that reason, insisted it could not be the land mentioned in the bill; they denied any trust between the brothers, and any knowledge of an entry by *James*, or of a grant to him of western land; they admitted the grant of administration and the descents, as charged by the plaintiff, but denied all the other facts charged in the bill and put her to the proof of them, and relied upon the length of time which had elapsed, and upon the statute of limitation.

At a hearing, had in the court of equity for the county of Burke, at September term, 1826, the trust between *Andrew* and *James* not having been established, the bill was dismissed as to those of the defendants who were the heirs of the former; and was subsequently prosecuted against the other defendants.

The contract was exhibited and proved, and a deposition taken, which proved the death of *Bowman* in Georgia, and that the plaintiff was his niece, and only relation, who was a citizen of the United States at his death.

No counsel appeared for the plaintiff.

Gaston, for the defendants.

RUFFIN, Judge, after stating the facts above mentioned, proceeded as follows:

Supposing the case to stand upon the original questions of right between the parties, it would not be difficult

Dec. 1832.

TATE v. COWAN et al

to give the plaintiff relief to the extent of the purchase money and the interest. It is a contract for lands, of which the original vendor had a right to a specific performance; and although it does not appear that *Kerr* was ever able to perform it, yet as there is no evidence that either he or *Bowman* treated it as broken or incapable of execution, it still continued to be land in this court, at the death of *Bowman*. His heir had a right to the land; and if she could not get it, she had the right to the money payable in lieu of it, as against the executor of her ancestor, who made that money land between his own representatives. It would be the least the defendants could ask, to get clear upon the payment of the purchase money and interest.

The purchase money paid upon an agreement for the sale of land is, in equity, considered as land, and if the contract is vacated after the death of the vendee, it goes to his heir.

But the lapse of time excludes all consideration of those rights. The statute of limitations does not protect the defendants. The case does not come within it; the relief going on the vendor's being a trustee, in this court, for the vendee. But equity itself respects time when the trust is not express; because it is difficult to ascertain the truth of old transactions, and therefore parties capable of acting, shall not be allowed to impose that difficulty upon the courts; and because acquiescence for a long period, according to the ordinary experience of the actions of mankind, raises a presumption of performance or satisfaction. Where such a presumption is altogether excluded by the situation of the thing or the parties, the court must undertake the investigation and get through it as well as we can, however remote the period be, to which we are carried back. But it must appear that there is some disability, or other excuse for not sooner bringing forward the claim. The party who wishes to repel the effect of time, must furnish the means of doing it.

In an agreement for the sale of land, the vendor is considered to be a trustee for the vendee, & the statute of limitations does not, in equity, bar the latter. But that court respects the lapse of time in cases of implied trusts, and unless explained it is a bar to the relief.

There is a lapse of thirty four years here between the making of the contract and the filing of the bill. Surveys were made, and grants issued by this state, for western lands, up to the cession in 1789, in which was reserved to this state the power of still issuing certain other grants; which was exercised for many years.

Bowman could therefore have filed his bill in a very short time, after 1786, for a conveyance, if *Kerr* had received a grant; or if not, to compel him to complete his survey and obtain a grant.

It is however charged in the bill, that he died in the year . and left the plaintiff an infant, who married during infancy, and continued covert until within three years and an half before she brought this suit. This allegation is in itself defective; because it fixes the death of the vendee and the marriage of the plaintiff at no certain periods, and it may be that *Bowman* lived more than twenty years after 1786. If the marriage of the plaintiff could be carried back to her infancy, and that to the death of *Bowman*, which actually occurred before any reasonable presumption arose, then the objection would be met. The bill does not make that case—and the proof is more defective still, than the allegations of the bill. The answers say nothing on the subject. Plaintiffs must not at the hearing, take the silence of the defendants as admissions. If they want an admission, they must except to the answer which is not fully responsive, and get a further answer, or a *pro confesso* upon the very point — The only deposition upon the subject proves the death of *Bowman*. The witness is asked the time and place of it; and answers as to the latter, that it was in Georgia, but gives no answer as to the former. Nor is there any proof that the plaintiff was an infant at this time, nor at the time of her marriage, nor that she was ever married;—but only that she is the heir of *Bowman*.— These may all doubtless be facts, notorious where the parties live: and the events may have occurred at periods, which would rebut all presumption from the great length of time. But in the absence of all evidence, the pressure of the presumption must be felt, as would direct evidence of the fact of satisfaction. The particular circumstances tend to fortify the general presumption. The lands were in the actual occupation of the Indians, among whom it was so dangerous to go, that almost all locations were made by a few persons who acted as general agents. It is highly probable, that *Kerr* knew no-

Dec. 1832.

TATE v. CONNER, et al

thing personally of the land; and from the total failure on each side, to trace any entry for land, such as is described in the contract, or in his own name, we might perhaps justly conclude, that both parties, discovering that the contract had been entered into under a total mistake, rescinded it, and settled. This would be morally probable, if *Bowman* lived even for a few years. But the court does not rely on particular presumptions. Our opinion is founded on the staleness of the demand, after thirty-four years, unaccounted for by the death, the infancy, coverture, distress or ignorance of the several persons respectively entitled under the contract, through that period.

PER CURIAM.—Declare that the plaintiff has not proved the time of *William Bowman's* death—nor that it happened while the plaintiff was an infant—nor that the plaintiff married during her infancy—nor that she was ever married—and that the plaintiff hath not accounted for the delay of thirty-four years in filing her bill, after the contract in the pleadings mentioned was made, and that by reason of this delay, the demand made by the bill, is too stale to be enforced, and performance thereof decreed—and decree, that the bill be dismissed with costs.

DEC. 1832.

NATHANIEL C. BISSELL v. JOSEPH BOZMAN.

For the benefit of trade, the captain of a ship is liable for her disbursements in a strange port; but if he consigns to the person making them, property of the owner sufficient to cover them, the consignee, by paying the funds in his hands to the owner, without deducting the disbursements, discharges him.

After the reference ordered in this cause, (*ante p.* 154,) the master filed his report, from which it appeared, that the account of *Myers & Son*, against the brig William, amounted to the sum of $499 82, of which, $50 was charged as having been paid to the plaintiff, and $223 14 as "cash paid the custom-house bill." The residue was for pilotage, sea stores, repairs and commissions; the particulars of the custom-house bill, were not given. In an account hereinafter mentioned, *Myers & Son* charge for storage, $48 52, and for bond and permit and duties at the custom-house, $2523 66; but *Myers* himself swore positively, that no part of the bill for disbursements for the brig were charged to the defendant's account, and they no where appeared to have been, unless the custom-house bill was by mistake included in the large item for duties.

The plaintiff, as captain of the brig, had consigned the vessel and cargo to *Myers & Son*, as the property of the defendant, to whom he directed them to account. This was in March, 1816. The cargo sold for $4774 45, and netted over and above all charges then debited to the defendant, the sum of $1994 57. The consignees took up a bill of the defendant's for $1056 33, drawn in March, 1816, which, with other small matters, left a balance due him of $904 23, which *Myers & Son* acknowledged to him on the 22d of August following. Early in 1817, *Myers & Son* received another consignment of property belonging to the defendant, which netted him $203 71, and on the 21st of May, of that year, they rendered him their account, including that sum and the former balance of $904 23, and charged him with "*W. P. Foster's* note for sugar in sales per brig William,

Dec. 1832.

Bissell v. Bozman.

protested $301 25;" this account showed a balance due the defendant of $806 11, which was remitted him on the 29th of July following. The defendant then sent an agent to Norfolk, where *Myers & Son* resided, to demand the amount of *Foster's* note, claiming that he was not bound for it, as *Myers & Son* had never informed him of such a note being received for his sugar, and refusing to recognize it as his property. This claim was finally, but reluctantly acquiesced in by *Myers & Son*. The plaintiff in a letter to the defendant dated July 18th, 1820, informed him that he had refused to allow *Myers & Son* their claim of $499 82, because they knew he was only the master of the brig, and because they had the owner's property in their hands, and might have paid themselves, and could not resort to him four years after paying over the monies in their hands to the owner.—One of the Mr. *Myers'* proved, that after their letter to the plaintiff, informing him of the collection of the bill on the West Indies, and of their charging against it the amount of the brig's disbursements, he applied to them for all the money collected for him, which was refused by them, because as captain, he, as well as the owner, was liable to them, and that the owner had refused to pay them.

Myers & Son, had become bankrupt, and had made an assignment of their effects, and it did not appear that the plaintiff had received any payment from them or their assignees.

On these facts, the master charged the defendant with the amount of the plaintiff's money retained by *Myers & Son*, and for this he excepted.

As to so much of the order of reference which directed the master to enquire as to the value of the mortgaged slaves, which had been bought by third persons, he reported, that this was the fact as to one only; that the evidence as to his value, was so contradictory he could not come to any just conclusion upon it; that in this uncertainty, he had, from his own knowledge of the slave, charged him to the defendant at $400, deducting from it $153, at which he was credited to the

plaintiff; to this, both parties excepted, the plaintiff, because it was too low, and the defendant, because it was too high.

Iredell and *Kinney*, for the plaintiff.

Gaston, for the defendant.

RUFFIN, Judge, after stating the facts, proceeded: The first thing to be done in support of *Bissell's* claim is, to establish a debt to *Myers*. In that view, it might be material to enquire, whether a general advance of money to the captain is a disbursement for the ship, without showing the purposes to which it was applied, or at least was to be applied. The item of "custom-house bill" might also need explanation; for of itself it is not sufficient to charge a consignor, who has a right to the particulars, especially when there is a probability, from the nature of the charge, and the delay in presenting the whole claim, that it might have been included in other general charges.

Questions might also be raised upon the right of a surety to charge his principal by the acknowledgment or voluntary payment of a debt, barred by the statute of limitation, on which *Bozman* insists. But as the protection to which *Bissell* was entitled against this demand, has a foundation much more meritorious than mere lapse of time, I do not think it worth while to consider the effect of that.

Has *Bissell* paid *Myers & Son?* If he has, was he so liable to them as to enable him by paying them, to make *Bozman* his debtor?

There seems to be no reason to doubt, that in a port, not the vessel's own, proper disbursments on, or for the vessel, constitute a demand for which, the vessel, the master and the owner are all liable. As to the master, this is a departure, introduced for the sake of trade, from the general principle, that he who acts as agent, and is known as such, is not bound personally, unless he expressly promise. Whatever may be the grounds of this rule in reference to strangers, as between him and his owner, the master is in the nature of a surety,

Dec. 1832.

Bissell v. Bozman.

In that character, he recovers back from the owner any monies he has paid, and has a lien upon the ship for advances, standing in the place of those whose claims he has satisfied. And in that light he must be viewed by the consignee of the ship and her cargo; at all events as far as the proceeds of the cargo will serve to satisfy the consignee, or indemnify the captain. If the consignee, as well as strangers, has the right to regard the captain in ordinary cases as the owner, because in possession, and another owner may not be found, yet a consignee with funds does know the owner in the most effectual manner. When the master thus leaves behind him the means of paying the debt for which he was liable, and in the hands of the man to whom the debt is due, he feels that he has no right to retain the vessel, and readily gives her up to the owner., thereby parting from the security given him by the law for his indemnity. The consignee can retain his whole demand out of the proceeds of the cargo. Common sense and common honesty say, the debt is paid as to the surety. It is not the ordinary case of a creditor getting a security of his own provision. Even then, the creditor is bound in good faith to take care of the surety. The relation between them calls for that benevolence. But here the surety himself provides the security. He does it for his own benefit, as well as that of the creditor. The creditor cannot part from it to the prejudice of the surety. He cannot say, he did it by mistake; but must bear the consequences of his own mistake, and ought not afterwards to look to any body but the principal. *Bissell* was competently discharged; and I think in no court of justice could a recovery have been made against him.

The captain is liable as the surety of the owner, and has, as to him, all the rights of one.

The captain when discharged from liability to the consignee, cannot affect the relations subsisting between him and the owner; neither by a subsequent payment to the former can he make the latter his own debtor.

Was he aware of his discharge? Expressly on that ground, he refused to pay the demand in 1820, and so informed *Bozman*. Then could he afterwards pay *Myers & Son*, and make the debt his own? I am now supposing that *Bozman* owed *Myers & Son*, and that the latter had a remedy against him. Could *Bissell* interpose? I think not. The connexion between them was dissolved. He was cut loose, and had no right nor power

to untie *Bozman* from *Myers*, for the sake of getting a faster hold himself. *Bozman* had a right to prefer *Myers & Son* for creditors; he might be able to pay them easier, or to resist this demand altogether when made by them. Having gotten clear, *Bissell* could not again make himself a party, but by a new request from *Bozman* like any other stranger. This is not like reviving a debt, barred by the statute of limitations, by the acknowledgment of a surety. Here there was no debt remaining as far as concerned *Bissell*. He was under no obligation legal or moral, except not to interfere to the prejudice of either party. And that obligation was increased by the refusal of *Bozman* to *Myers & Son*; of which no doubt, *Bissell* was informed, in answer to his letter of July, 1820—a refusal not founded on the ground that the disbursements had not been made, or had been paid for by *Bissell*, or any thing else, which *Bissell* could know to be false; but on the ground that *Bozman* had himself paid. And if *Bissell* did not get that information from *Bozman* in 1820, he did from Mr. *Myers* in 1824, before he assented to the arrangement made by *Myers & Son* of his debt. After *Bissell* was discharged, and he knew it; after *Bozman* had refused to pay, which he also knew; after the lapse of eight years, for four of which *Myers & Son* had abandoned their claim against *Bozman*, or not prosecuted it; it was out of the power of *Bissell* and *Myers & Son* by any act or agreement of theirs', to resuscitate this demand against *Bozman*, and especially to transfer him to *Bissell*. But has *Bissell* paid it, or even agreed to pay it? *Myers* makes it appear in his books that he did. But the fact is not so. *Bissell* never assented to that application of his money. They promised a dividend on the balance. He rejected it, and demanded the whole. They assigned as a reason for their conduct, the refusal of *Bozman* to pay them. Did that appear to *Bissell* to be a good reason? Did he think that he and *Bozman* were both bound, or that the refusal of the latter made him, *Bissell*, bound? Did he act on such a belief? No. He made no settlement with *Myers*; took no receipt for the money, no order on *Bozman*. He gave

Dec. 1832.

Armsworthy v. Cheshire.

no acquittance to *Myers* for so much of his own money; but kept his demand open, as a subsisting one, which he would have rendered available, but for *Myers'* insolvency. When the present controversy arose, he thought he could use it to more advantage in it, and therefore, pursued his claim against the others no further.

Upon no ground can the claim be sustained, and the exception must be allowed.

A master cannot act upon facts which are within his own knowledge.

As to the other exception, the master says, that he could form no satisfactory opinion of the value of the slave upon the testimony of the witnesses, because they differed so widely; and fixed the value upon his own knowledge. That was not a proper ground for him to proceed on; for we cannot act on it, and must decide upon the evidence. Upon the weight of that, the court ascertains the value to be $200. That *Bozman* objects to, because he thinks the other party confined to $153, the price bid. The court has already said, the effect of that sale under the act of 1812, whatever it may be, is waived by the cross bill to foreclose. We must now look upon it as a sale by *Bozman* himself; confirmed, indeed, by *Bissell*, by not making the purchaser a party to his bill. But how far does that confirmation go? Only to the title, not to the price. Suppose the slave sent to distant parts, so that *Bissell* could not reach him, or sold to a person without notice. The mortgagee who sells without a decree, must be sure to get the full value; for he is parting with another man's property. The expression, "price or value," used in this case before, meant, that if the price exceeded the value, *Bissell* was entitled to it; if less, then to the value. That is the risk a mortgagee must be made to run, to keep him straight.

A mortgagee who sells without a foreclosure is responsible for the value of the property sold.

Per Curiam.—Decree accordingly.

John Armsworthy *et al.* v. Aquilla Cheshire.

A defendant at law has no relief in equity against a void judgment; as where no *sci. fa.* was served on the heir, and the creditor obtained a judgment and purchased his land, the judgment being void, and the remedy at law complete, no relief can be had in equity.

The plaintiffs alleged that they were the heirs of one *John Armsworthy*, deceased; that the defendant had re-

covered a judgment against his executor, in which the plea of *fully administered* was found for the defendant; that by a subsequent agreement between him and the executor, he had agreed to receive an assignment of a debt due the testator in South-Carolina, in satisfaction of his judgment; that he had, notwithstanding this agreement, caused writs of *scire facias* to be issued against them, and had, without their knowledge, obtained a judgment, issued execution and bought the land which descended to them at an undervalue, and had taken a deed therefor from the sheriff. The bill prayed a reconveyance and general relief.

The defendant in his answer admitted that he was to take an assignment of the South-Carolina debt, but averred, that it was collateral to his judgment, satisfaction of which was only to be entered in case of his collecting that debt. He stated, that he had made efforts to collect it, but having failed, he had issued writs of *scire facias*, which were served on the plaintiffs, and judgment regularly entered.

The plaintiffs filed a replication to the answer, and took proofs as to the agreement to take the debt due the testator in South-Carolina as a satisfaction, but a statement of them is unnecessary.

No counsel appeared for the plaintiffs.

Nash and *Winston*, for the defendant.

DANIEL, Judge, after stating the pleading as above set forth, proceeded: If the *scire facias* against the plaintiffs never was served, the judgment entered on the same, at the return thereof was void, and they had complete relief in a court of law, and have no right to come into this court for redress. Whether the writ was, or was not served on the plaintiffs, does not appear; no copy of the record of that suit being filed.

As to the next point in the case, viz: that the defendant agreed to take the South-Carolina claim as a satisfaction of his judgment: it does not appear to the court, in the first place, that such an agreement ever was made; and in the second place, if the plaintiffs were

An assignment by an executor, of a bond due his testator to a creditor who has establish-

DEC. 1832.

TURNER v. NAVIGATION COMPANY.

able to establish it, they, instead of coming into this court, should have pleaded the same to the *scire facias*. They could have defended themselves at law, under the plea of accord and satisfaction, and if the issue had been found for them, the defendant never could have had judgment against the lands. Equity does not relieve when a party neglects a proper defence at law, (1 *Mad. c.* 77, *Ware* v. *Haywood*, 14 *Ves.* 28.) We think that the bill, for these reasons, should be dismissed.

ed his debt, and has a *sci. fa.* awarded against the heir, may be pleaded by the latter as an accord and satisfaction.

PER CURIAM.—BILL DISMISSED.

JOSIAH TURNER and THOMAS D. WATTS,

v.

THE CAPE-FEAR NAVIGATION COMPANY *et al.*

The Cape-Fear Navigation Company having laid out a town and sold the lots under an impression that they would open the navigation to it, and it turning out that the funds of the company would not admit of it, whereby the lots were rendered worthless; but the company having made no fraudulent concealment or representation of their means, they and the vendors being under an honest mistake: It was held, that the latter could not be relieved.

The bill recited the several acts of Assembly incorporating the Cape-Fear Navigation Company, and stated that at their passage as a good natural navigation existed from Fayetteville to the ocean, it was the intention of the legislature, that the contemplated improvements should be made above that town, so as to enable the counties west of it, to carry their produce to market by water; that the Deep and Haw River Navigation Company had, before the incorporation of the defendants, purchased a large tract of land at the confluence of those two rivers, and laid out a portion thereof as a town, calling it Haywood; that by the act incorporating the defendants, the property of the Deep and Haw River Navigation Companies vested in them, and they became owners of that land; that in accordance with the intention of the legislature, the defendants having a capital

of $150.000, in the years 1816, 1817 and 1818, avowed their determination to improve the navigation of the river up to Haywood; that thereby, a general expectation was created, that Haywood would become a flourishing market town, which was increased by the defendants' advertising notices of their intended improvements, and pretending to make contracts for digging canals and erecting locks; that from these causes lots in Haywood greatly increased in value, which value was enhanced to the utmost by the officers of the defendants; that in July, 1818, the defendants advertised in the public papers a sale of lots in Haywood, to take place in September following; that in the advertisement, the defendants caused it to be stated, that the lots "were near the centre of the state, and convenient to the greatest part of the country raising the great staples of tobacco and wheat;" and further to impress upon the public mind, that the proposed navigation would soon be opened, and thereby to enhance the value of their lots, it was set forth in their advertisement, "that the company expected in less than two years to have a commodious navigation to this town, (Haywood,) for boats carrying fifty hogsheads of tobacco;" and the public were assured, that no exertions should be wanting on the part of the defendants, to complete that object. That the lots were sold at auction under the direction of the president of the company, and that during the sale, the auctioneer in his hearing repeatedly declared, that he was authorised to say that the improvements advertised, would be completed within two years, as funds fully adequate thereto, had been subscribed, and contracts therefor made.— The plaintiffs then alleged, that they, in common with many others, were misled by these representations, and purchased two half acre lots, for which they bid $1420; that they executed their bonds for the purchase-money, and received a deed of bargain and sale. It was then stated, that the defendants had wholly neglected to make any improvements in the navigation above Fayetteville, but were disbursing their funds below that town, and were making dividends to the stockholders from the

Dec. 1832.

TURNER v. NAVIGATION COMPANY.

monies received by a sale of the Haywood lots, which were thus rendered worthless, except for the purpose of agriculture, and for that, were not worth more than any other land of the same quality; that the plaintiffs had avowed their determination to resist the payment of their bonds, but that the corporation had assigned them to the other defendants, who had notice of their intended defence, and had put them in suit. The bill concluded with a tender by the plaintiffs of a re-conveyance of the two lots, and a prayer that the contract might be rescinded, and for a perpetual injunction against a judgment obtained on the bonds.

The corporation in their answer insisted, that it was their duty and interest to improve the navigation below the town of Fayetteville, as well as that above it; that with a view to this, they had purchased a number of negroes, who were placed upon the river below that place, to remove obstructions; that this course was dictated by their experience of the fact, that white laborers could not be employed to work in the low country, and it was universally known at the sale of the Haywood lots, that this was a permanent investment for the improvement of the lower part of the river; that as to the navigation between Fayetteville and Haywood, the improvement of it required more skill than that below the former place, because in the latter, sand bars alone were to be removed, whereas, in the former, canals were to be dug and locks built; that being entirely ignorant of the science of civil engineering, they had, just before the sale in September, 1818, after due caution, and as they thought, upon sufficient information, made a contract with one *Stroud* for the contemplated improvements between Fayetteville and Haywood; that at the sale, it was distinctly announced by *Stroud*, who attended it, that there was no time specified in his contract, within which it was to be completed; and that all its stipulations, together with the plans, &c. were fully disclosed; that the officers of the corporation honestly thought that they should be able to perfect the navigation, and participating in the common delusion, and thinking that the lots at Haywood were

selling too low, they had stopped the sale. They admitted, that the works commenced by *Stroud*, had failed, and finding the resources of the company much diminished, they had, in order to effect the greatest possible amount of improvement, confined themselves to working upon the river below Fayetteville; but that they intended to re-commence above with more experience.

The answer of the other defendants, it is not necessary to state, farther than that they claimed under an assignment of the bonds by the corporation to them in payment of a debt.

Replications were put in to the answers, and proofs taken; the contract with *Stroud* was filed as an exhibit. It is not necessary to give a statement of the depositions, as they supported the answer on all material points.

Badger, for the plaintiffs.
Gaston, for the Navigation Company.
Winston, for the other defendants.

DANIEL Judge, after stating the facts, proceeded: The contract being executed, nothing is left for a court of Equity to do in respect to it, provided the transaction is a fair one. If there was no fraud in making the sale and obtaining the bond, parol evidence is inadmissible for the purpose of annexing a condition to the written deed, which appears on its face to be absolute and unconditional. Any declarations made at the time of the sale by the vendor, relative to the property, if not incorporated in the written contract of sale, are presumed to have been abandoned by the parties, as forming no part of it. They are not to be proved by parol, to explain the contract, or in any way to affect it, except when it is alleged that they were false, and so known to be by the vendor at the time, and were spoken with a view to commit a fraud on the vendee. In looking into all the evidence in this case, I am unable to discover any declaration made by the agents of the company, which were made with a fraudulent intent. The declaration made by the auctioner at the sale in the hearing of the president of the company, and by the order of one of the directors, that

Dec. 1832.

Turner v. Navigation Company.

the River would be made navigable by the company in a reasonable time thereafter, appear to me not to have been made with any fraudulent intent to enhance the price of the lots. The large capital they had got subscribed, the contracts they had made with workmen, to execute the work, the stop put to the sales of the lots by the company's agents, the day the plaintiffs purchased, the large sums expended by the company in their endeavors to complete the navigation and their continued efforts to effectuate the object to the present time, all these circumstances connected with the facts, that the plaintiffs had a full knowledge of the capital subscribed, the contracts entered into by *Stroud* and others to do the work, the plans and nature of the work to be done, all taken together repel the presumption that the agents of the company intended to commit a fraud at the time the sale of the lots was made. The company's agents were honestly mistaken in the declarations and in their expectations. It is a hard case for the plaintiffs, but that is no reason for this court to interfere, much less to rescind this executed contract. I think this case is within the principles of the two cases cited by the council for the defendant. The first is the case of *the city of London* v. *Richmond*, (2 *Vern.* 421.) The city of London articled with a man by the name of *Aldersen*, to lay a new leaden pipe of five inches, diameter for the carrying water to *Cheapside* and *Stocksmarket*, which it was affirmed, would carry twenty tons of water each hour; whilst this was doing, the city by a committee, treated with *Haughton* to grant him a lease of the water, reserving a portion of the same water for the prisons and certain conduits, and he agreed to pay a rent of £750 per annum, for fifteen years. It so fell out, that the pipe would not discharge but six tons an hour; and instead of being a beneficial concern, it would not produce above £300 per annum. *Haughton* assigned the lease, became insolvent, and the rent was in arrear; the bill was filed for payment, and to carry the covenants in the lease into effect. The chancellor said, as a beneficial bargain will be decreed in equity, so

if it happen to be a loosing bargain, for the same reason it ought to be decreed.

In the case of *Legge* v. *Croker*, (1 *Ball. and Beatty*, 506.) the court determined that a lease deliberately executed, could not be set aside on account of an unfounded, though justifiable assertion of the lessor pending the treaty; there being no wilful misrepresentation, nor on the grounds of mistake, from an omission of a general warranty in the lease, such not constituting a part of the agreement. In this case as the company have been honestly mistaken, and as there is no covenants inserted in the deed, or left out by mistake, and, as there is no fraud, although it may be a hard bargain, we have no right to relieve against it. A failure in a speculation forms no ground to resist a specific performance. (*Adams* v. *Weare*, 1 *Bro. Ch. Rep.* 569. *Mortimer* v. *Cupper*, *Ib.* 156.) I think the injunction should be dissolved.

HENDERSON, Chief-Justice.—Were this an application by the company, to have this contract executed, I think that as it has turned out so contrary to the expectations of all parties, if we are to believe what is said on both sides, that this court would not interfere, but leave the parties to their remedy at law. But the application comes from the other party to set aside what has been done. The court is not invoked to do something upon the contract which the law cannot do, to give the plaintiffs aid beyond their rights at law—but to take from the adverse party rights, to which at law, they are entitled. A disappointment in their reasonable expectations, a hard or a bad bargain, do not afford sufficient grounds for the court to undo what has been done, although it would probably be a good reason for refusing to do more than what the parties had done, on the ground, that it was only agreed to be done, or more than the law would do for them. To rescind a contract in this court, or to set aside an executed contract, there must be something like an actual fraud, which would give an action at law, or a vital mistake. Upon a careful

Dec. 1832.

Turner v. Navigation Company.

examination, I can perceive nothing like a fraud; it was a mistake all round, as well among the purchasers as the sellers. The improvement was believed to be practicable with such means as the company might rightfully use in justice to the stockholders. It could not be understood that the river was at all events to be made navigable for boats carrying fifty hogshead of tobacco, but that the means the company were then using, and which it was their interest, as a company, to use, would produce that effect. There was nothing like a condition that this should be effected, or that the company would use all their means to effect it, disregarding their other duties or interests as a company, and nothing like a fraudulent concealment of their intention, or the difficulties known to them, but unknown to the bidders. I think all was fair and *bona fide*. Although I would not hold the vendee to be bound if the representations contained in the printed or written advertisement were false, or if there was any thing like a fraudulent concealment or misrepresentation, it is quite evident that what was said at the sale was nothing but an amplification—a picture of what was contained in the advertisement in more glowing colours, and nothing more was intended, or understood to be intended, than what was in substance contained in the advertisement, and should any expression have gone beyond it, it was clearly understood to be only matter of opinion, and had only the weight of an opinion, not of an allegation.

As to using the money arising from these sales for the purposes of opening the river elsewhere, or even in making dividends upon the stock, it is the undoubted right of the company to use it as they please, for I consider them to have contracted no obligation, but what was contained in their advertisement, and imposed by their charter. Therefore although it may be a very hard bargain as it has turned out, I can see no ground of relief, without subverting the very principles upon which this court acts. There has been no violation of any warranty or contract, no fraudulent representation or concealment—no violation of the terms of sale—no

violation of their charter,—uothing but what now appears to be a delusion in which all, both vendors and vendees participated.

PER CURIAM.—BILL DISMISSED.*

* Judge RUFFIN having been of counsel for the plaintiffs, took no part in the decision.

HARRIET FREEMAN *et al.* v. WILLIE PERRY *et al.*

Where the property of a female was conveyed to trustees upon trust to permit her intended husband to receive the profits during his life, and then in trust for the wife and the issue of the marriage; a purchaser of a slave, part of the trust estate, under an execution against the husband, with notice of the articles, who held possession adversely to the trustees, more than three years during the life of the husband, and who, to a bill filed by the wife and children within three years after his death, pleaded the statute of limitations, was held—

By DANIEL, J. to be a trustee for the plaintiffs, although he acquired nothing by the sale, as the plaintiffs were not guilty of any laches, and had a specific right to the slave.

By HENDERSON, C. J. to stand in the place of the husband, and being a privy in estate to be affected with the trust declared in the settlement.

Upon the marriage of the plaintiff *Harriet* with *William D. Freeman*, he entered into articles, whereby he agreed to convey to *Jones Cooke* and *Marmaduke Jeffreys*, defendants, all her property in trust that they should "suffer and permit the said *W. D. F.* to have the "use and enjoy the profits accruing from said property, "during his natural life, and upon the death of the said "*W. D. F.* that the aforesaid property shall be, and "enure to the use and benefit of the plaintiff and her child "or children and their heirs forever, as tenants in com-"mon," with remainders over, in default of issue. By a deed of the same date with the articles, to which the plaintiff *Harriet*, then an infant, and her intended husband, *W. D. F.* were parties, all her estate was conveyed to the defendants *Cooke* and *Jeffreys*, in trust to permit "the said *W. D. F.* to have, use and enjoy all and sin-

Dec. 1832.

FREEMAN v. PERRY.

"gular, the profits arising from the said land and ne-"groes hereby conveyed, during his natural life, and "upon his death, that the same shall be, and enure to "the benefit of the said *Harriet*, and such child or chil-"dren of the body of the said *Harriet*, as may be then "alive, and their heirs forever, as tenants in common," with remainders over, as in the articles. The marriage took place, and the other plaintiffs are the issue of it. The settled property went into the possession of the husband, who shortly thereafter became insolvent, and executions issued against him, under which several of the negroes conveyed in the marriage settlement to the defendants *Cooke* and *Jeffreys*, were purchased by the defendant *Perry*, he having at the time of his purchase, express notice of the articles, which were read by the trustees, and they upon his purchase, demanded the slaves of him. *W. D. Freeman* died more than three years after the possession of the defendant *Perry* commenced, leaving the plaintiffs, his wife and children, surviving him. This bill was filed within less than three years after the death of *Freeman*, the plaintiff *Harriet*, having been under age at the time of her marriage, and the other plaintiffs being at the commencement of this suit, infants of tender years.

The bill sought to have the negroes conveyed to the plaintiffs, and an account of their hires, and in case of failure therein, to subject the defendants *Cooke* and *Jeffreys*, for a breach of trust.

The defendant *Perry*, relied upon the act of limitations and the act of 1820, (*Rev. c.* 1055,) to quiet the title of persons in possession of slaves; and it was agreed, that the questions made upon his answer, should be determined before any others were discussed.

W. H. Haywood, for the plaintiffs.

Devereux and *Winston*, for the trustees, contended, 1st. That the plaintiffs were in this court protected by reason of their several disabilities, and if the defendant *Perry*, had acquired a title which would bar the action of the trustees, he was, by the rules of this court, con-

verted into a trustee for the plaintiffs; and they cited *Bond* v. *Hopkins*, (1 *S. & L.* 429.) *Kane* v. *Bloodgood*, (7 *John. C. R.* 121.) *Allen* v. *Sayer*, (2 *Vern.* 368.)

2d. That the purchase by the defendant *Perry*, under the execution against *Freeman*, made the former a privy in estate because of the act of 1812, (*Rev. c.* 830.) authorizing the sale of equitable interest in real and personal estate.

Gaston and *Badger*, for the defendant *Perry*, argued,

1st. That wherever the legal estate of the trustee was gone, the equitable interest of the *cestui que trust* being dependent upon it, failed also; and for this, they cited *Wyche* v. *East India Co.* (3 *P. W.* 309.) *Cholmondeley* v. *Clinton*, (2 *J. & W.* 1.)

2d. That the interest of *Freeman* was not one which was within the act of 1812. (*Bogert* v. *Percy*, 17 *John. R.* 351.)

DANIEL Judge, after stating the facts, proceeded: Such a trust as *Freeman* had in the property was not subject to be sold under an execution, by virtue of the act of 1812. That act operates, as a legislative conveyance of the legal estate to him who purchases the use; for it declares that the purchaser shall hold and enjoy the property by force and virtue of the execution, freed and discharged from the legal title of the trustee; who was before the sale possessed in trust, for the defendant in the execution, The legislature meant to subject those trusts to sale under execution, of which the *cestui que trust* might, in a court of equity, have enforced a conveyance of the legal estate from the trustee to himself. The act embraces only such trust estates as are co-extensive with the legal estate held by the trustee; so that the legislative divestment of the legal estate, from the trustee, should not operate to the injury of third persons, or any ulterior remainders in trust.

Per DANIEL, J. The act of 1812, authorizing the sale of trust estates by execution, applies where the trust estate of the defendant is co-extensive with the legal title; not where the trustee holds for the defendant for life with remainder to others.

If *Freeman's* life interest, in these slaves, could have been sold by execution, under the act of 1812; the legal estate would have been, by operation of the sale, and the conveyance of the sheriff, transferred from the trus-

Dec. 1832.

Freeman v. Perry.

tees to the purchaser. There would have been left no legal estate in the trustees, to have upheld and fed the uses and trusts, contained in the ulterior limitations and remainders mentioned in the deed of settlement. These equitable remainders must have all been destroyed, for the want of a legal estate in fee, in the trustees, to have fed and supported them. The legislature did not mean that the act should work such an extensive mischief; it meant that it should operate upon plain express trusts, which trusts were co-extensive with the legal estate in the trustee. It never intended that an execution should interfere with complex trusts, or where there was a series of successive trusts, arising in a deed or will, all fed from the same legal estate. The sale of the slaves made by the sheriff was void; *Freeman's* trust estate, being only a life estate. There were by the deed of settlement, ulterior limitations of trusts, fed by the legal estate in the trustees; therefore the execution did not reach any of the trusts, notwithstanding, the trustees, the sheriff and *Perry*, all believed that the trust interest of *Freeman* was by law, subject to be sold; and under that belief the sheriff did sell, and *Perry* with full notice of the plaintiff's title under the settlement, purchased the slaves at the sale, and took a conveyance of them from the sheriff. The trustees forbid the sale and demanded the slaves of the defendant; and he refused to deliver them, but they never brought any action at law to effect a recovery. The trustees were barred by the act of limitations, and had they brought an action of detinue for the slaves, against *Perry*, after three years from the time of his purchase, they would have failed in it. The defendant *Perry*, now contends that the plaintiffs have a remedy against the trustees for breach of trust in neglecting to sue him, and recovering the slaves, before his estate in the same, was ripened into a good title by the act of limitations.

I grant that the trustess are liable to the plaintiff, but have they not a right to elect to consider *Perry* as being a trustee for them under the circumstances of the case, and follow the property in his hands? The plaintiff

Harriet was a *feme covert*, until a less time than three years before the filing of this bill; and the other plaintiffs are infants. Suppose the trustees were insolvent, must the loss fall on the plaintiffs, and *Perry* be permitted to hold the property, although he had express notice of the contents of the deed of settlement? If the trustees had have made a conveyance to *Perry* of the slaves, with notice to him of the trusts, a court of equity would have held him a trustee to perform all the trusts in the deed. Will the manner in which he has obtained the possession of the slaves destroy the plaintiff's rights, although the legal title of the trustees is destroyed by the acts of 1715 and 1820, and by operations of the same, their legal title is transferred to him? The sheriff sold the interest which *Freeman* had in the slaves; and although it was not subject to execution, yet the sheriff intended to pass that estate by the sale, and *Perry* intended to take the same, not by the way of a trespass or *tort*, but by a contract of purchase, having full notice at the time of the trusts.

I admit that a disseisor, abator, or intruder, or any person, who holds the estate in the *post*, although they have notice of a trust arising out of the estate, will not be considered by a court of equity as trustees. It is said by the counsel for *Perry*, that their client holds these slaves neither by privity of estate, privity of contract or by fraud. Furthermore, that the trustees, *Cooke* and *Jeffreys*, are barred of their legal title by the act of limitation, and that the defendant is answerable for the slaves neither at law to them, nor in equity to the plaintiffs. The sheriff when he levied on the slaves, did not intend to commit a *tort*. He levied under the belief, that the equitable estate of *Freeman* could be sold by virtue of the act of 1812. *Perry* purchased under the same belief, and that the sale would by operation of law, transfer to him both the legal and equitable estate during the life of *Freeman*. Shall *Perry* be now heard to say that there is no privity between him and the original trustees? That this court cannot, consistently with its own rules, declare him a trustee, although he had notice of the ulte-

Dec. 1832.

Freeman v. Perry.

rior trust of the settlement? I think he cannot be permitted to set up such a defence, and although the original trustees are barred by the act of limitation, and cannot regain the legal estate, yet in consideration of the manner in which *Perry* obtained the slaves, viz: by contract, he must be declared and considered by this court to hold them as a trustee for the plaintiffs. The rents and profits of the estate were liable in equity to the creditors of *Freeman*; he might have rented the land and hired the slaves, and received the money himself, or paid his debts with it. An assignment by *Freeman*, during his life, to raise money to pay his creditors, would have been protected in equity, particularly where the assignee had seen to the application of the purchase-money. The purchase-money in the present case, was applied to the debts of *Freeman*, and I think that this court, under such an equity, set up by *Perry*, would have stopped the trustees in prosecuting a suit at law against him for the recovery of the slaves. But the court would have first seen that the fund was safe and subject to be surrendered to the trustees on the death of *Freeman*.—(*Townsend* v. *Windham*, 2 *Ves. at p.* 10. *Codagan* v. *Kennet*, *Cowp.* 432. *Fearne on Remainders*, 408, 9, 10. 13*th American edition*.) We cannot permit *Perry* to protect himself from the trust, of which he had notice, by hearing him now assert that either the sheriff, when he levied was a *tort feasor*, or that he himself committed a *tort* when he took the slaves home; and that now he is beyond the reach of this court. It may be stated as a rule in equity, that all persons coming into possession of trust property, with notice of the trust, shall be considered as trustees, and bound with respect to that special property, for the execution of the trust. (*Daniels* v. *Davidson*, 16 *Ves* 249. *Adair* v. *Shaw*, 1 *S. & L.* 262. 2 *Mad. c.* 125.) I think that *Perry* should be considered as a trustee of the slaves mentioned in the bill, for the plaintiffs, and that he be decreed to deliver them and their issue to either of the parties, and account for their hires.

HENDERSON, Chief-Justice.—It is not true that a new estate in the thing sold, is acquired by the purchaser under a *fieri facias;* he succeeds to the interest or estate of the defendant, and to no other; nor is the case different, where the defendant has made a fraudulent deed to another, *quoad* the creditor it is the debtors estate. *Perry* by the purchase acquired *Freeman's* estate and no more, and he cannot now object that *Freeman's* interest could not be sold under a *fi. fa.;* he is concluded from alledging it; therefore, the claim of *Perry* in opposition to the trustees is a nulity, if *Freeman* could not support it. It is like the case of a tenant for life conveying in fee; the vendee notwithstanding his deed in fee, and his claim in fee, is still tenant for life, and the reversioner may draw upon him as his tenant, and compel him to perform the obligations of tenant for life, and although, if the conveyance be by fine or feofment, the reversioner may consider it as a forfeiture, and enter upon the cognizee or feofee, yet he may waive the forfeiture and demand the reserved services of the cognizee or feofee. Their confidential relations connot be assumed and put off, at pleasure. The joint act of the parties and the law created them, and they can be put an end to, only in the same way. The purchaser as to strangers succeeds to the estate of his vendor, their declarations to the contrary notwithstanding. If an action were now brought against *Perry* for refusing to deliver up the negroes at the time of the sale, the statute of limitations would bar that action, for plainly it arose at the time of the refusal; but if the trustees chose to waive it, and consider *Perry* as in *Freeman's* place, and wait with him as long as they could wait with *Freeman*, that is during life, and then do as is now done by the *cestui que trust*, (*Freeman* being dead,) call upon *Perry* to surrender the slaves, the statute is no bar, for there has been no adverse possession. The fact is, that by *Freeman's* death there was no interest or estate in *Perry* to protect. Had he taken the negroes tortiously, he would have acquired a tortious estate; but having acquired a limited

Dec. 1832.

Pierce et ux v. Perkins et al

one, that is during *Freeman's* life and the pleasure of the trustess, it expired by *Freeman's* death.

There is some difficulty as to the jurisdiction, for the trustees have the legal estate, and should have sued *Perry* immediately on *Freeman's* death, but as they will not, or have not done so, and *Perry* as long as he holds is *quasi* trustee, I think this bill may on these grounds be sustained.

Per Curiam.—Direct an account.

John R. Pierce *et ux* v. Robert W. Perkins *et al.*

In a general reference of a matter in dispute, the arbitrator may decide upon moral and equitable considerations, and where he intended to decide according to law, a mistake, to vitiate the award, must appear upon its face.

The bill alleged, that the *feme* plaintiff was one of the next of kin to *William Perkins*, deceased, that administration upon his estate had been committed to *Frederica*, his widow, and that the defendants were her sureties; that the administratrix refusing to make a distribution, the plaintiffs and one *Burrows* and his wife, who were also next of kin, put the administration bond in suit in Halifax County Court; that pending that suit, the plaintiffs being residents of the State of Virginia, a rule of reference was made, whereby the matter in controversy was referred, with the consent of the present plaintiffs' attorney, and of *Burrows*, to arbitration, the award to be a rule of court; that the plaintiffs had no notice of the rule of court, nor of the subsequent proceedings before the arbitrator, who returned an account taken by him of the assets of the intestate which came to the hands of his administratrix, and of her disbursements, from which it appeared, that her payments exceeded her receipts, and thereupon he awarded, that the suit should be dismissed, of which the plaintiffs had no notice in time to object.

The bill then specified several mistakes, both of law and fact, which the plaintiffs insisted the arbitrator had made, and also several instances of misconduct on his part, particularly, that he had not sworn the witnesses, and had examined the agent of the administratrix in her discharge, in private, when no one was present on the part of the plaintiffs, and they prayed for relief against the defendants, notwithstanding the bar at law created by the award.

The defendants denied all the material facts alleged in the bill, and proofs were taken, but it is not necessary to state their substance, as they can be easily understood from the opinion.

Devereux, for the plaintiffs.

Badger, contra.

RUFFIN, Judge.—The reference was a general one for a decision of the matters in controversy, according to right, and not according to law; and the arbitrator could properly admit his judgment to be influenced by all moral and equitable considerations. It does not appear, that he meant to be governed by the law and awarded erroneously, supposing it to be one way, when it was the other. According to *Ryan* v. *Blount*, (*ante* 1 *vol. p.* 382,) such a mistake can be made to appear in no other way than by the award itself. That disposes of thus much of the bill. But neither the award nor the evidence shows that the arbitrator acted upon any mistake, either of law or fact. His own deposition has been taken, and directly repels both allegations. He intended to decide according to what he deemed justice between the parties, without regard to strict law. If he erred in that, without any unfairness by either party, and without grossly mistaking material facts, the parties are bound by it; because he is a judge of their own choosing, and they have agreed to abide by his judgment. An error in judgment, as a thing possible, must have been in their contemplation, and they are therefore taken to have agreed to run that risk.

The evidence is equally inadequate to the establishment of any mistake of fact. The arbitrator now thinks

Dec. 1832.

Pierce et ux v. Perkins et al

the facts to be as he then thought them. Whether the evidence before him was sufficient to establish them, was left to him to decide. He did not misconceive the evidence, by supposing it different from what it was, and certainly he drew no grossly wrong conclusion from it. He computed nothing falsely, and there is no reason to believe that the arbitrator would award differently, if he were to pass on the same evidence again; or if every fact which now appears had then been made to appear before him. If then he erred at all, it was altogether in judgment, which all tribunals may do; and the parties stipulate not to except to an error purely of that sort in an arbitrator. It must be so, else this domestic forum is held more strictly to infallibility than any other passing upon both law and fact. There is nothing it seems to us in the decision of the arbitrator, which furnishes a reason for setting it aside.

An error of judgment in an arbitrator, is no reason for setting aside his award.

The plaintiffs charge however, that the reference was made without their knoweldge or consent, as were also the award and judgment. It does not appear affirmatively that they a had personal knowledge or agency in it. The facts are, that the suit at law was brought at the relation of the plaintiffs and *Burrows* and wife, who appeared by Mr. *Burges* as their attorney; and that the agreement and rule of reference was made between the defendant on one side and *Burrows* as one of the plaintiffs, and Mr. *Burges* as the attorney of all the plaintiffs on the other. The authority of the attorney of record to make all agreements for the conducting or determining the suit cannot be disputed by his clients; other persons are not to take notice of his private instructions, or his want of instructions. They have a right to consider his authority full, to manage the suit as the party himself could; and the client must be bound by his acts, unless he can clearly establish collusion between the attorney and the opposite party, which here is not pretended. It is likewise true, that the arbitrator did not give the plaintiffs notice of the time and place, of hearing the case; but he gave notice to *Burrows* and *Burges*, and indeed sat in the office of

A party to a cause is bound by any agreement respecting it, made by his attorney, notwithstanding the latter may have disobeyed his instructions.

the latter. *Burrows* and *Burges* were both present and produced and examined the witnesses, and cross-examined the witneses offered on the other side. This is proved both by the arbitrator and witnesses who were examined before him. *Pierce* himself lived in another state, and *Burges* and the other party plaintiff did not object to proceeding, but assented to and assisted in the trial. Mr. *Burges* indeed now says, that he did not consider himself the attorney of *Pierce* out of court. The court thinks he was not then at liberty to say so, his client being abroad, and that he and his client are less at liberty to say so now, after withholding his objection then and acting as the attorney. The opposite party was bound then to recognize him as representing *Pierce;* and have therefore a right that *Pierce* shall be bound by the acts of *Burges* as his representative. If he has suffered by it, his recourse is not against the party, but his attorney. The court is therefore of opinion, that the reference and award are obligatory, without the personal assent of *Pierce.*

And where the attorney of a non-resident appears before an arbitrator, and examines witnesses, his client is bound by the award, altho' the attorney was only to act in court.

There are two acts of irregularity upon which the award is impeached as constituting, what is technically called in the court, misbehaviour in the arbitrator.

The one is, hearing the testimony without swearing the witnesses. The answer to that is, that it was proposed by Mr. *Burges* himself, upon his knowlenge of the integrity of the witnesses, and his belief that they would say nothing but what they would swear to, and the arbitrator can proceed upon the statement of the parties made by themselves, or by others by their consent.

An arbitrator can, with the consent of the parties, act upon the statements of witnesses not under oath; but it is misconduct in him, without consent, to examine a witness in private.

The other is, that the arbitrator heard at home, in the absence of the other parties, the statements of a person, who was a witness, and the agent of the defendants.—This would form a good objection to the award, if not satisfactorily explained, even if the award were otherwise unobjectionable. The first principles of justice require that no private instructions should be received, nor evidence heard, without giving the other party an opportunity of being present. The arbitrator may be influenced by such representations insensibly to himself;

Dec. 1832.

Pierce et ux v. Perkins et al

and the party has a right to know the proof, that he may object to it if improper, or answer it, if proper. But the evidence in this case is clear, that the arbitrator proceeded at home only to examine the vouchers of the administratrix, and this at the request of Mr. *Burges*; that he did not decide on them, but suspended every doubtful one for further proof, which was to be taken at the meeting that afterwards took place at Mr. *Burges'* office. What had been done was communicated to him at that time and approved, and the witnesses then examined to the disputed items; and what renders this objection altogether unavailing is this decisive fact, that there is in the bill no allegation of an error or mistake in any item, except those to which the testimony taken in the presence of the parties applied, and concerning which no other proof was heard but that given in the presence of the parties. The arbitrator heard nothing, in the absence of either party on which he acted, or on which he could act, in reference to the objections now made.

There is no precise charge of corruption in the bill; and what is faintly stated there has been properly abandoned entirely in the argument, for there is not the slightest evidence in support of it.

The bill must therefore be dismissed without examining into the strict propriety of the award upon the merits; though, if it were necessary to decide the cause upon that point, it seems to us that it might be difficult upon the whole case, to have come to a conclusion differing much from that of the arbitrator. Nor has the court thought it necessary to determine the effect of the judgment entered on the award, with notice to the attorney and without opposition by him; because we think the award itself good, and that no opposition to it ought to have been effectual.

Per Curiam.—Bill dismissed.

SAMUEL RALSTON v. HUGH TELFAIR *et al.*

A bequest of the residue "to be disposed of as my executors think proper," is a gift to them for their own use, and since the act of 1789, (*Rev. c.* 308,) making executors trustees of the residue, it is a question of construction, and parol evidence is not admissible to prove the next of kin entitled.

Samuel Ralston, the younger, a native of Ireland, died in the county of Pitt, without issue, having by his will devised as follows: "It is my will and desire, that my "notes and bond amounting to between eight and ten "thousand dollars, should remain in the custody of "*Churchwell Perkins*, who has them now in possession, "and that he should collect them as speedily as possible, "and to pay the debts, and the remainder to be paid to "the executors, to dispose of as they may think fit. It "is my will, that the remainder of my property should "be disposed of as my executors think proper." He appointed the defendants his executors.

The plaintiff alleged himself to be the next of kin to the testator, and insisted that the executors were trustees for him. The bill prayed an account of the administration of the defendants, and for payment of the residue.

The defendants denied that there was any trust for the plaintiff, and insisted that they, under the will, took the residue for their own use.

A replication was filed and proofs taken, but as the cause was decided without reference to them, a statement of them is unnecessary.

Gaston, for the plaintiff.

Hogg and *Badger*, for the defendants.

DANIEL, Judge, after stating the will and the pleadings, proceeded: This is not a case where parol testimony can be received to repel or support presumptions. The plaintiff is entitled to a decree in his favor if the defendants do not take as legatees; to ascertain that fact, we can only look to the written instrument. The whole will may be examined to find out the intention of the testator, but no parol proof is admissible, to aid us in

Dec. 1832.

Ralston v. Telfair et al

finding out that intention. It is contended for the plaintiff, that the clauses in the will before quoted, only create a trust in the executors, without defining the objects, and that it results to the plaintiff as next of kin.

There is a distinction between an express trust for an indefinite purpose, and those cases where from the indefinite nature of the purpose, the court concludes, that a proper trust could not have been intended; though words may have been used, which, had the objects been definite, would by construction import a trust. In the first description of cases, the devisee does not take beneficially, in the latter, he does. The case of *Morris* v. *the Bishop of Durham*. (9 *Ves.* 399. 10 *Ves.* 522, 537,) is an instance of the first kind. That was an express trust, for an indefinite purpose, and it was declared to be a trust for the next of kin. The case was this: the testatrix by her will, bequeathed all her personal estate to the *Bishop of Durham*, his executors, &c. upon trust, to pay her debts and legacies, &c. and to dispose of the ultimate residue to such objects of benevolence and liberality, as the *Bishop of Durham*, in his own discretion shall most approve of; and she appointed the Bishop her executor. The chancellor said, (10 *Ves.* 535,) "if the testator meant to create a trust, and not to make an absolute gift, but the trust is ineffectually created, is not expressed at all, or fails, the next of kin take. On the other hand, if the party is to take himself, it must be upon this ground, according to the authorities; that the testator did not mean to create a trust, but intended a gift to that person for his own use and benefit, for if he was intended to have it entirely in his own power and discretion, whether to make the application or not, it is absolutely given." He said the next consideration was, whether there was a trust effectually declared, and as there was an intention to create a trust, but the object being too indefinite, it had failed. "The consequence of law is, (*page* 543,) that the Bishop takes the property upon trust to dispose of it, as the law will dispose of it, not for his own benefit or any purpose the court can effectuate," and he affirmed a decree at the Rolls in favor of the next of kin.

In the case of *Paice* v. *the Archbishop of Canterbury*, (14 *Ves.* 364,) the chancellor says, (*page* 369,) "no case has gone the length of holding executors to be trustees for the next of kin, under a bequest for such purposes as they shall in their discretion think fit. If, as in the case of *the Bishop of Cloyne* v. *Young*, (2 *Ves.* 91,) the testator declares that he gives it in trust, and then does not declare the trust, or as in *Morris* v. *Bishop of Durham*, the trust declared fails, the executors being clearly intended not to have the benefit, must be trustees for the next of kin; but there are many authorities, that a bequest to A. for such purposes as he shall think fit, is a gift to himself. That must always depend on the particular terms of the will." In the case of *Gibbs* v. *Rumsey*, (2 *Ves. & Bea.* 294,) the testatrix gave the residue of her property to her executors, *Henry* and *James Rumsey*, "to be disposed of to such person and persons, and in such manner and form, and in such sum and sums of money, as they in their discretion, shall think proper and expedient." The master of the Rolls said, (*page* 297,) "do these subsequent words import a trust? The testatrix has very frequently in the course of her will, used the words, "in trust," but those words are not introduced here. I see nothing here, but a purely arbitrary power of disposition according to a discretion which no court can direct or control. It is said, (*page* 295,) the testatrix meant the executors to give this property to some body, and not to enjoy it themselves; but that might be said in every case of a bequest to give to objects not distinctly specified, and in every case of a general power of appointment." He further said, (*page* 299,) "the next of kin had no right to call upon the executors to account for the residue." From the before mentioned authorities, we are of opinion, that the executors in this case do not hold the property in trust, but take beneficially for themselves. The bill must therefore be dismissed.

RUFFIN Judge.—The evidence offered by the plaintiff does not establish any thing in his favor; for it on-

Dec. 1832.

Howell v. Hooks.

ly shows that the testator knew he had relations in Ireland, and expressed sometimes an affection for them; there is no declaration of an intention to provide for them.

But were it ever so explicit to that effect, it would be of no avail in this court. It is inadmissible under our law. Since the statute, there is no equity nor resulting trust to be rebutted; upon which grounds alone such evidence has been heard in the English chancery.—Here the executor, as such, can take nothing. He gets only what is given to him by the will; which must be construed as to his legacy, like it is as to all others, namely, on the words themselves. It is with us a question of construction of the instrument.

Upon the will itself, I think no trust can be raised. The cases cited at the bar establish that a devise to one to dispose of at his will and pleasure, carries the beneficial and the absolute interest. The cases of *Powell* v. *Powell's Executors.* (2 *Murph.* 326.) and *Gibbs* v. *Ramsey*, (2 *Ves. & Bea.* 294.) are strong authorities. The words are too indeterminate to raise a trust, without turning every unlimited power of appointment into a trust, and a void trust, because indefinite. The discretion given to the legatee excludes that of all others, courts as well as individuals, and constitutes that *arbitrium* in the disposition, which amounts to ownership. I concur that the bill be dismissed.

Per Curiam.—Bill dismissed.

Ralph Howell, *Executor of* Robert Crawford,

v.

Philip Hooks *Adm'r. of* Arthur Crawford.

The terms of a written agreement, cannot be varied by parol proof in equity more than at law, unless upon an admission by the defendant; or unless the provision sought to be established, was a substantive part of the agreement, and omitted through fraud or mistake: as where an absolute bond was given to indemnify bail, and the proof was of admissions by the obligee of the intent, but nothing to show fraud or mistake, or that a condition was omitted: It was held to be single.

The bill charged, that *Arthur Crawford*, the intestate of the defendant, at the request of his father *Robert*, the

testator of the plaintiff, became the bail of one of his brothers in a criminal prosecution, and that the father agreed to indemnify him, and to give him a bond to that effect; that the defendant's intestate drew the bond, and taking advantage of the age, infirmities and confidence of his father, wrote a bond for $ 500, payable absolutely to himself, at the death of the father, which was executed by the latter, and delivered to the obligee. It was expressly charged, that the omission of the condition of indemnity, was by the fraudulent design of the obligee; or if not, that it was the condition and sole purpose of the delivery. *Arthur* never suffered by his engagement for his brother. The bond, upon the death of both parties, which happened soon after the transaction, was put in suit by the defendant. The prayer was for a discovery, and a perpetual injunction.

The defendant in his answer stated, that he found the bond among the valuable papers of his intestate, and being absolute on its face, he considered it his duty to collect it; that he knew nothing of the execution, nor the consideration of the bond, nor of any condition on which it was delivered.

A replication was filed and proofs taken, which are stated in the opinion of Judge RUFFIN.

W. C. Stanly, for the plaintiff.

J. H. Bryan and *Mordecai*, for the defendant.

RUFFIN Judge.—There is no proof of the age, infirmities or mental capacity of the father, nor of an undue influence of *Arthur* over him; nor any evidence as to the terms in which the instrument was directed to be drawn, nor of those in which it was represented to the father to be drawn; nothing to show, that in its structure it was different from what it was then thought and intended by both parties to be. But several depositions, which were read *de bene esse*, contain full proof of declarations by *Arthur* shortly after the date of the bond, and subsequently, that his father gave him the bond as an indemnity; and that it was to be paid, if he suffered, otherwise destroyed.

Dec. 1832.

Howell v. Hooks.

The question is upon the admissibility of the evidence to establish the alleged condition. The case of *Mease* v. *Mease* (*Cowp.* 47.) is an authority at law upon the very point, that such evidence cannot be heard. The rule of evidence is generally the same in both courts, In equity, there is the advantage of the defendant's answer; but if that fails to confess or to open the case, and it is to be made out entirely by proof, the terms of an agreement in writing can be no more varied here than at law; unless it appear by clear proof that the provision sought to be established, was a substantive part of the contract, and intended to be inserted in the instrument itself, but was not through fraud or mistake. To these points there is no proof here; nothing as to what passed in coming to an agreement, or as to drawing it up, or to show that the father did not know it was absolute in its terms, or did not intend it to be. The evidence is, as to the manner in which the son should use the bond upon certain contingencies, and that drawn from his verbal declarations. To act upon it would be to insert a condition inconsistent with the legal operation, and contradicting the express terms of the instrument; which would break down all distinctions as to degrees of evidence, and destroy the confidence that ought justly to be reposed in solemn contracts. (*Fordyce* v. *Willis*, 3 *Bro. C. C.* 577.) This is altogether distinguishable from evidence impeaching a contract upon a consideration which renders it void by the words of a statute, or a rule of the common law, or a principle of equity. There the terms are not varied: and I believe no case can be found in which a court of equity, more than a court of law, has received parol evidence of the agreement directly in the teeth of the contract as reduced to writing. This is as strong a case as could be, for the moral honesty is doubtless, if there be reliance in the party's words, and the witnesses' oaths, on the side of the plaintiff; and there might be very probably such a confidence between father and son. But the relation cannot be allowed to set aside the rule of law; for there is no point at which we could say the relation of the par-

ties should operate, and beyond which it should not; whether it should take in or exclude brothers, very intimate friends, and the like.

The court cannot therefore take notice of the evidence, and the bill must be dismissed with costs.

PER CURIAM.—BILL DISMISSED.

While the case above stated, pended in the court below, and after the proofs were taken, the defendant, fearing that the plaintiff would obtain a perpetual injunction, filed a bill against the plaintiff and one *Edwards*, in which he charged, that upon the faith of the judgment he had obtained at law, he had been fixed by the defendant *Edwards* with its amount as assets, and praying that the defendants might interplead, and that he might be protected in the final disposition that might be made of the cause.

W. C. Stanly, for *Edwards*.

RUFFIN, Judge.—It is not now necessary to decide the questions made for the defendant *Edwards*, against the equity claimed by the plaintiff, upon the score of the pendency of the original suit against him, upon the bill of the other defendant. That suit is now decided in favor of the defendant therein; so that the sum recovered by him, upon the bond of *Robert Crawford*, is now found to be properly applicable to the debt to *Edwards*, as has already been decided at law. Whether *Hooks* could have any remedy against *Edwards*, after the judgment at law, or whether the present be the proper remedy, especially at the period it was resorted to, cannot now be material, and are therefore not decided; though upon the former point, there seems at least strong justice on the side of an administrator for relief in some way, had the suit of *Howell* against him, resulted differently. In the event which has happened, this bill must be dismissed with costs to *Edwards*.

It seems, that an executor who has been charged with assets in respect to a judgment which is enjoined, is entitled to relief; but whether at law or in equity. *Qu?*

A motion was made on behalf of *Edwards*, for a decree here for the sum due him, upon the ground that his judg-

A defendant whose judgment has, pending a suit in equity, became dormant, is not, upon a dismission of the bill

Dec. 1832.

Sanders v. Sanders.

ment was dormant. This might be under the statute, if an injunction had been granted and a bond taken; but no injunction has ever been awarded, nor does it appear that the judgment at law is dormant, or even not satisfied by a levy of the money—consequently, the motion must be refused, and *Edwards* left to proceed on his judgment at law, if it be yet unpaid.

entitled to a decree for his debt, unless an injunction has issued.

Per Curiam.—Declare accordingly.

Ransom Sanders v. William Sanders et al.

An administrator who has, without neglect, been compelled to pay debts of his intestate to an amount exceeding the personal estate, will be reimbursed out of the real assets.

But if the payment be voluntary, whether he will be aided. *Qu?*

The case made out by the bill was, that the plaintiff was appointed administrator of *John Sanders*, by the County Court of Johnston; that he found among the papers of his intestate, evidences of debt to the amount of $8400, against *Reuben Sanders*, who was perfectly solvent; that this sum was subject to a legal set-off on the part of the debtor, which reduced it to the sum of $5317, which was assets in the hands of the plaintiff, and for which he was charged in suits brought by the creditors of the intestate; that *Reuben Sanders*, the intestate, and one *White*, had been co-partners in trade; that the former had been charged before the death of the intestate, with the settlement of the co-partnership; that *White* had become insolvent, and *R. S.* had found that the co-partnership dealing had eventuated in a loss, which from the insolvency of *White*, was to be borne by him and the intestate; that he had obtained a decree in the court of Equity for the County of Johnston, whereby the amount of the balance due at law by him to the intestate, was reduced to $1447; and that in consequence of this equitable set-off of *R. S.* against the debt above mentioned, not being a defence at law to the plaintiff against

the creditors of his intestate, he had been subjected to the payment of debts to an amount exceeding the assets which had come to his hands. The defendants were the heirs of *John Sanders*, the intestate, and the bill prayed, that the real asset which had descended to them from their ancestor, might be sold, and from the proceeds thereof the plaintiff might be indemnified for the amount he had paid over and above his receipts.

Copies of a judgment at law in favor of the plaintiff against *R. S.* and of a decree establishing the equitable set off of the latter were filed.

Gaston and *Devereux* for the plaintiff, cited *Williams* v. *Williams* (*ante p.* 69.)

W. H. Haywood for the defendant.

HENDERSON, Chief-Justice —We do not mean to decide the question whether an administrator or executor, who goes beyond his assets in payment of debts, without showing a special reason for doing so, can claim to be reimbursed out of the real estate. Here, the administrator has made out a very clear and strong case, why he was compelled to pay debts beyond the amount of his testator's personal estate; and has given a very satisfactory reason, why he, in his inventory, charged himself with the full amount of the apparent debt due his intestate from *Reuben Sanders*, and how it was afterwards diminished by throwing on the estate, a claim which *Reuben Sanders* had on the co-partnership, by the insolvency of *White*, one of the partners. We think that the plaintiff did not act improperly in charging himself with the full amount of that debt in his inventory, and that it was his duty to allow the decree obtained by *Reuben Sanders* against him, an account of *White's* insolvency, as a set-off against it. If by these means, he was charged and did pay to creditors beyond his assets, he has a fair claim in this court to a reimbursement.— Next as to the proof. The decree in the suit of *Reuben Sanders*, against the co-partnership, fixes, as to the defendants, both the amount of his claim, and the liability of the administrator to the sum decreed against him for

Dec. 1832.

Sanders v. Sanders.

the insolvency of *White*, for that would have been its effect in a suit at the instance of *Reuben Sanders* to subject the real estate to its payment, and such must be its effect in favor of those who are substituted to his rights. The conclusive effect of that suit arises from the *peculiar relation subsisting in our law*, between the personal representative and the heir. I call it *peculiar*, for I believe it no where else exists. Here they are not strangers as they are in England, but there is a *quasi* privity between them, as the former defends as well for the heir, as for the other creditors, the legatees, and next of kin. The judgment against him, in the absence of fraud, is conclusive upon all, except as to the plea of fully administered. The law allows the heir to contest that, when brought in to show cause, not why the creditor should recover his debt, but why he shall not have his judgment, obtained against the executor or administrator, levied out of the real estate, It is upon this privity that an executor or administrator, who has disbursed beyond his assets, stands in a different situation from a mere officious intermeddler, who obviously pays money for another, and then claims reimbursement. What may be the effect of such a state of facts, this case does not require us to decide. The debt being thus conclusively fixed on the heir, there being no fraud, no collusion, it remains to prove the expenditure of assets, and as to that, an account must be taken.

The heir is concluded by a judgment against the adminisrrator, as to every thing but the amount of assets received by the latter.

Per Curiam.—Direct an account.

John Wagstaff v. Charles Smith.

A tenant in common, in possession, is not protected by the statute of limitation from an account to his co-tenant of the rents and profits, until three years after a partition.

This bill prayed an account of the issues and profits of land, of which the plaintiff and defendant were ten-

ants in common. The defence by plea and answer was the statute of limitations.

Upon the proof, it turned out, that the bill was filed in the court of Equity for Granville, in February, 1829, and a partition had been made of the land held in common in November, 1826.

Nash and *Devereux* for the plaintiff.

Badger for the defendant.

HENDERSON, Chief-Justice, after stating the above facts, proceeded: The statue of limitations commenced running when the partition was made, for it is not the receipt of each particular item of an account which puts the statute in motion, but the *cesser* of the privity or connection from which the accountability arises. So long as that relationship or privity or connection continues, the statute does not commence running. During that time there is nothing adverse, no withholding by the one, to the prejudice of the other. The very act of receiving affirms the confidential relationship in law or in fact. Any other construction would destroy all confidence, and necessarily put a limit of three years to all those confidential connections in pecuniary matters, which tend so much to facilitate the transactions of society. The defendant must come to an account.

PER CURIAM.—DECREE ACCORDINGLY.

KENNITH McCASKILL v. ARCHIBALD McBRYDE and ATLAS JONES.

A bill charging that the defendants were the agents of the plaintiff, and also executors of a former agent, and seeking by reason of their having received assets of their testator, to charge them with the balance due by him, is not multifarious.

The bill charged, that the plaintiff in the year 1819, being a resident of Moore County, and about to remove to Scotland, appointed one *William Martin* his agent, to

Dec. 1832.

McCaskill v. McBryde.

collect sundry debts due him, including one from *Martin* himself, and to sell several articles of personal property, and make remittances to the plaintiff; that *Martin* under this agency, collected money, the particulars of which were specified, but made no remittances; that he was dead, having appointed executors, of whom the defendants were the survivors, and had received assets to an amount exceeding the debts due by their testator; that upon the death of *Martin*, the plaintiff executed a power of attorney, authorising the defendants to collect all monies due him in this state; that under this power they took into their possession all the evidences of debt due the plaintiff, and had made him some remittances, but still had in their hands a large sum due him—particularly, that the defendant *Jones* had collected $2500, which he had not paid over, but had removed from the state, having placed notes in the hands of the other defendant, to make good his default. The bill then charged, that the defendants either had, or ought to have collected the balance due the plaintiff by *Martin*, as well for the debt he owed, as for collections made by him, having as his executors, assets to pay and discharge all his debts; that the plaintiff had, at the request of the defendant *McBryde*, commenced an action at law against him as the executor of *Martin*, for the balance due to the plaintiff, to which the defendant had pleaded the several statutes protecting dead men's estates, and thereby defeated the action. The prayer was for a discovery, and an account.

The defendants demurred, because the bill sought to charge them in the distinct character of agents for the plaintiff, and executors of *Martin*.

His Honor Judge Daniel, at Moore, on the last circuit, overruled the demurrer, and the defendants appealed.

W. H. Haywood and *Winston*, for the defendants, contended, that the bill was multifarious, and for this was cited *Davoue* v. *Fanning*, (4 *John. C. R.* 199.) *Attorney General* v. *Corporation of Carmarthen*, (*Coop. Rep.* 30.)

They insisted that an answer denying combination was not necessary. (*Coop. Pl.* 183. *Lansdown* v. *Elderton*, 8 *Ves.* 526.)

As a cause of demurrer *ore tenus*, it was urged, that the court had not jurisdiction, the remedy at law having been complete, and the plaintiff being barred there, for which was cited *Peace* v. *Nailing*, (*ante* 1 *vol. page* 289.) *Dinwiddie* v. *Bailey*, (6 *Ves.* 136.) *Porter* v. *Spencer*, (2 *John. C. R.* 169.)

Badger, for the plaintiff, urged, that wherever a bill containing several distinct matters was demurred to, the defendant must answer by denying the combination; and as this was not done by the defendants, their demurrer covered too much, and must be overruled. (*Verplank* v. *Cains*, 1 *John. C. R.* 57. *Attorney General* v. *Brown*, 1 *Swan.* 304. *Jones* v. *Frost*, 3 *Mad.* 8. *Witherhead* v. *Blackburn*, 2 *Ves. & Bea.* 121.) As to the objection to the bill as being multifarious, he cited *Mitford's treatise*, 147.

HENDERSON, Chief-Justice.—This demurrer for multifariousness was certainly put in under a mistaken view of the case; for the bill seeks to charge the defendants on account of their own agency only, on their own undertaking, and in no way calls them to account for the agency of their testator. It is true the agency of *Martin* is also stated, and that they are his executors, and that assets came to their hands; but this is only an unnecessary statement of the evidence, which it would be more proper to show before the master, to prove that they themselves had collected, or might have collected the *debts due from Martin*, by proof of his assets in their hands. There is no pretence to say that the bill is multifarious, as calling them to an account both for *Martin's* agency and their own. As to the jurisdiction of the court, I do not know how it can be doubted, for the defendants certainly are the bailiffs, agents or receivers, of debts due from others to the plaintiffs, and the case is strengthened, if it needed it, by the removal of the principal to a foreign country. Can there be a doubt but that it is a proper case for an an action of account at law. PER CURIAM.—DECREE ACCORDINGLY.

Wherever the defendant is the agent, bailiff or receiver of the plaintiff, a court of Equity has jurisdiction for an account.

Dec. 1832.

NATHANIEL J. PALMER *et ux et al.*

v.

THOMAS ARMSTRONG and WILLIE SHAW.

A testator gave land and goods to his executors to be sold, "and after payment of all my just debts, the residue of the monies arising from them to," &c. The words, "after payment," &c. subject the land in exoneration of other legacies, but not in favor of the next of kin.

The plaintiffs claimed under the following clause in the will of *James Lapslie:* "I give and bequeath to my "executors, hereinafter named, my tract of piney land "on the head waters of Enoe and Back creek, to be "sold, together with my stock of every description, and "after the payment of all my just debts, the residue of the "monies arising from the sale, to my said two supposed "daughters, (plaintiffs,) to be laid out in their education "and support," &c. There was no residuary clause in the will.

The defendants were the executors of the testator, and the only question presented to this court was, whether the property given in the clause of the will above set forth, was charged absolutely with the payment of the testator's debts, so as to exempt the residue, or whether it was charged upon the failure of the residue, so as to exonerate other legacies.

From the accounts taken in the cause, it appeared that if the residue was charged before the property bequeathed to the plaintiffs, they were entitled to $853 66, being the amount for which the land and stock sold; but if the property devised in the clause of the will above cited, was primarily chargeable with the debts of the testator, then the plaintiffs were entitled to nothing.

His Honor Judge STRANGE, at Orange, on the last Spring Circuit, dismissed the bill and the plaintiffs appealed.

Nash and *W. A. Graham*, for the plaintiffs, cited *Inchequin* v. *French*, (1 *Cox's Cases* 1.) *Ancaster* v. *Mayer*, (1 *Bro. C. R.* 454.) *French* v. *Chichester*, (2 *Bro. P. C.* 192.) *Downe* v. *Lewis*, (2 *Bro. C.* 257.) *Gray* v. *Minnethorpe*, (3

Ves. 106.) *Tait* v. *Lord Northwick,* (4 *Ib.* 816.) *McLelland* v. *Shaw,* (2 *S. & L.* 528.) *Livingston* v. *Newkirk,* (3 *John. C. R.* 319.) *Bootle* v. *Blundell,* (1 *Merv.* 215.) *Hunter* v. *Bryan,* (2 *Wheaton at page* 41.)

They contended that the whole question was one of intention, and that the rules to ascertain it were the same here as in England, and for this was cited the *St.* 5 *Geor.* 2d, act of 1784, (*Rev. c.* 226.) *Miller* v. *Harwell,* (3 *Murp.* 194.)

Winston, for the defendant, contended, that the direction of the testator was a conversion out and out, and that the questions as to the priority of the fund liable to pay debts, did not arise; this being a mere pecuniary legacy charged with the payment of debts, he cited *Mallabar* v. *Mallabar,* (*Cases Temp. Talb.* 78.) *Rogers* v. *Rogers,* (*Ib.* 268.) *Durour* v. *Motteux,* (1 *Ves.* 320.)

RUFFIN, Judge.—Most of the questions argued in this cause were considered and determined a year ago, in *Robards* v. *Wortham.* There the residue of the personalty was undisposed of, and there was a devise of land to be sold by the executor for the payment of debts, and the surplus of the proceeds given over. It was held, that although both were liable before land descended, the former was liable to creditors before the latter.

The case of *Robards* v *Wortham* (*ante page* 173,) approved.

The present discussion has not produced a doubt of the correctness of that opinion. It is admitted at the bar, that it conforms to the rule in England; but it is insisted that our law, which subjects land to all debts, has altered it here. The idea is that the testator is under no necessity in point of honesty, to provide a fund for creditors, since the law has effectually done that for him already; and therefore, that there can be no motive for his charging a particular part of his land with the payment of debts, but to fix that change conclusively upon it, in case of all other parts of his estate. But this reasoning applies equally in England to a case of debts by specialty, as between the devisee and heir. Yet nothing is more certain than that the latter pays those debts before the former, although the land devised be

The rule exempting lands charged with the payment of debts, until the personal estate is

Dec. 1832.

Palmer v. Armstrong.

ever so anxiously and expressly charged. The rule then is not founded on the reason supposed; but upon the notion of an intention in the testator, that his gift shall not be defeated as long as there is a sufficiency of estate not given to any body, to satisfy all demands against him. Besides that suggested, there are many other motives, applicable as well to this country as England, for making such a charge. It may be to discriminate between the liabilities of different devisees and not between them, or either of them and the heir. So it may be to prescribe the order of payment as between the land made liable to the debts, and specific legacies, and not as between either of them and the next of kin. And this is as strong here in relation to simple contracts as it is in England in reference to bond debts; for with us simple contracts cannot reach the land until all the personalty has been exhausted, as well that given specifically, as the residue bequeathed, and the surplus undisposed of. The land may then be charged for the purpose of exonerating and in a manner to exonerate particular parts of the personal legacies, and for that purpose alone, not to exonerate the whole personalty. It is in fine a question of intention, and we cannot here, more than in England, infer from the charging of one fund, an intention to ease another, liable by law before it.

exhausted, is not founded upon the notion of the testator's providing a fund not otherwise chargeable; but upon his presumed intent that his gift shall not fail while there is a surplus not given away.

Or to distinguish between different devisees, and not between them & the heir, or next of kin.

This however is stated not to be a case of a charge upon land, as such; but a case of conversion of the whole into personalty. Such I take it to be; and perhaps for that reason it is different from *Robards* v. *Wortham*, as discussed. Although the defendant was there both heir and next of kin, no question was made by him upon the undisposed surplus. He gave that up and contended only for the exoneration of the realty descended. Nor did it ocur to the court, that there could be a doubt about it. For that reason it was not accurately considered, whether there was to be a sale at all events or only in case it was necessary for the payment of debts, nor the effect, in the one case or the other, upon the residue of the personalty. It was not material in the determination of the point made by the defendant as heir; for if it be admitted,

as I suppose it must be, that where the principal intent of a sale of the land is to provide for the payment of debts, and upon the supposition that the purpose expressed will require a sale to be in fact made, the surplus is given over as money, and not as land—if, I say, in such case it be admitted, that the purposes of the sale shew that it was not absolutely to be made, and create a trust in the nature of a charge for creditors, which the donee of the surplus may elect to satisfy by paying the debts, and thereupon call for a conveyance of the land; yet that is between the executor and trustee on one side, and the donee of the surplus on the other. It would not alter the order of liability intended by the testator. And the devise *to sell for payment of debts*, although that was the *only* purpose of the sale, denoted the intention as much as a sale out and out would, that as between the devisee and the heir, the land devised should be first liable. And the only question made there was between those parties.

The rule is the same when there is a conversion out and out, and the residue given away.

Here there is a conversion out and out. There is to be a sale at all events, and not for the sole purpose of paying debts. The legatees are infant children, who could not elect, and who needed a provision for maintenance and education. The testator has elected for them and chooses to provide money, the mingled proceeds of land and perishable stock.

A pecuniary legacy charged with the debt of the testator, is to be reimbursed out of the residuum, as well when that is undisposed of, as when it is given away.

Taking it then to be a general pecuniary legacy, I do not perceive that it will make any difference. The question is between a pecuniary legatee and the next of kin. It is of the same nature with that before stated between the devisee of land and the heirs; only, stronger against the distributee, who is not so great a favorite as the heir. The rule is general, that legatees of all sorts are to be satisfied before the next of kin. Debts and legacies must be satisfied before there can be a residue. The remainder after paying all, is what constitutes the surplus. The *hæres natus* must yield to the *hæres factus;* because the testator meant effectually to give a part of his property, as he had a right to do. He who claims by law, and not by gift, must take subject to the law and all its incumbrances, unless the testator positively and

Dec. 1832.

PALMER v. ARMSTRONG

expressly directs otherwise. He to whom a thing is given subject to a charge, must bear it as against one to whom another thing is given clear of charge; but not as against him to whom nothing is given, and who succeeds, by law, and without any intention of the testator, to what is by law also subject to the same charge, and subject in the first instance. The legatee can indeed only have what is given to him; and if this legacy can be said to be a gift of the balance of the proceeds of the land and stock, after paying all debts *out of those proceeds*, then the argument for the defendant would be good. As if a particular thing be given to A, he paying £100 to B. or to my executor, or estate, or the like; then the question is, what is given, or on what condition. But that is very different from the enquiry, in what order is a general charge to be borne by different parts of the estate. Charging a particular debt on a legacy, specific or general, will attach it to that legacy in the same manner as if it be expressly given, *minus* so much. But these words "after payment of debts" generally, do not mean that this legacy, and *this alone*, should answer creditors. It so means as against other legatees; but not as against other personalty not disposed of. The testator intended to provide for his legatees, and not for his next of kin; and the latter can claim only upon the score of intestacy, in which case, the debts must be paid before a distribution, unless the testator has expressly ordered otherwise. The words do not cut down the legacy, but only charge it. Suppose a testator says in the beginning of his will, "after payment of my debts, I give," &c.; and then proceeds to devise lands, and also bequeath personal legacies, specific and pecuniary, and the residue generally. Such words doubtless charge the lands devised, but not in exoneration of lands descended nor equally with the legacies, of either kind. There is no partial exoneration of the personal estate by the real, and as to the personalty, the order of liability amongst the different parts of it is not at all affected; because as to that, the words mean nothing, since every part of it was liable to debts before. Pecuniary legacies would still be subject

before specific, and the residue bequeathed, before either; for the words "after payment of debts," go also to it, and disposing of it as a general residue shews that it was to be first applied, because *ex vi termini*, residue, generally means what remains after debts are paid. Much more is this the case, when the surplus is undisposed of. The argument is the same, when those words "after payment of debts," are applied to a general pecuniary legacy, in reference to the order of liability between that, and the residue or surplus. They subject that legacy before others of the *like kind;* but not before legacies liable in law before it, without the latter be expressly or clearly exonerated, or the charge on the first be in terms that make it exclusive of all others. It is a question of intention, and leaving a residue as a residue, proves the meaning to be, that it should pay in the first instance; much more where it is not given at all; for then there is nothing to shew the testator meant, that the law should not take its course in the administration of his assets. Consequently, I conceive the undisposed surplus is to be first applied in satisfaction of the debts, and as there is a sufficiency of that for that purpose, the petitioners are entitled to the whole proceeds of the land and stock.

PER CURIAM.—DECREE REVERSED.

JONATHAN ELLIS

v.

RODERICK AMASON, BLAKE LITTLE & ELIJAH PRICE.

The obligee of a bond in suit having assigned it verbally as a security to a creditor, and given him the custody of it, with authority to conduct the suit, and the obligor with notice of the assignment, having paid the debt to the obligee and taken a release from him: in Equity the interest of the assignee will be protected, and the obligor enjoined from pleading the release to the action at law.

The bill was filled in Sept. 1830, and charged, that in August, 1829. the plaintiff became surety for the de-

Dec. 1832.

Ellis v. Amason.

fendant *Roderick Amason*, in a note to one *Barnes*, for $400, and that *Amason* becoming soon afterwards embarrassed, the plaintiff applied to him to be counter-secured, and thereupon, *Amason* agreed to transfer, and did verbally transfer, to him a claim, which *Amason* then had in suit against the defendant *Little*, in Edgecombe County Court, for $600; that the plaintiff prosecuted the suit personally, and at a subsequent term obtained a judgment in the name of *Amason*, from which an appeal was taken by *Little*, who had before, and at the trial, notice that the plaintiff claimed the beneficial interest in the suit. The bill then charged the insolvency of *Amason*, and the payment of the debt to *Barnes* by the plaintiff, and that pending the appeal, the other defendant *Price*, pretended to have an assignment from *Amason*, of the claim on *Little*, and that he and *Little* had induced *Amason* to execute a release of the said demand, and to attempt to dismiss the suit. Process was prayed against the three, and an injunction against using the release, or dismissing the suit, or otherwise interfering with the plaintiff's receiving whatever sum might be recovered at law from *Little*. The bill did not charge any specific notice given by the plaintiff to *Little* or *Price*, or any thing from which it might be inferred, but the plaintiff's participation in the management and trial of the suit in the County Court.

The three defendants put in separate answers. That of *Amason* stated the demand against *Little* to be on his endorsement of a note made by one *Speight*, and admitted the assignment to the plaintiff for the purpose mentioned in the bill; he added, however, that besides this claim, he transferred to the plaintiff other notes, which he mentioned; and that the whole was intended as an indemnity against the debt to *Barnes*, and to satisfy certain monies (about $300.) which *Ellis* then agreed to pay for *Amason*, who had been arrested for that sum on a *ca. sa.*; that at court, *Ellis* refused to pay any part of the $300, but surrendered him, and he would have gone to jail, but for the friendship of *Price*, who advanced the amount for him, and took a written assignment of the

demand on *Little*, by way of security for that and other debts, for which he was *Amason's* surety. He admitted that he told *Price* of the transfer to *Ellis*, but stated also that *Ellis* had refused to perform his part of the agreement, and that he felt himself released from it. Of the assignment to *Ellis*, he said that he never gave notice to *Little*, until he understood from him and *Price* that they had settled, and *Price* received full payment; and that he then told *Little* of what had passed between him and *Ellis* as he had represented it to *Price*.

The answer of *Price* stated the transaction between *Amason* and himself, as set forth in the answer of the former, and said that he took his assignment at February Court, 1830: he then applied to *Ellis* for the note, for the purpose of trying the suit, but he refused to deliver it up, saying that he claimed it under the transfer to himself; upon which *Price* informed *Ellis* what *Amason* said was the agreement between them for the discharge of the *ca. sa.* which *Ellis* admitted to be true, and finally consented that the assignment to *Price* should be preferred to his, and that he would take the residue after *Price's* claims were satisfied. The suit was then tried, and an appeal taken by *Little*. The answer then averred in positive terms, that *Price* never at any time gave notice to *Little* of the assignment to *Ellis*, or of that to himself, or any intimation that either he or *Ellis* had an interest in the claim; but that being about to leave the state, shortly after the judgment, he *Little* and *Amason* got together and they came to a settlement, upon which, *Little* paid the full amount of the claim, which was received by *Price* and an acquittance given by *Amason* alone in full discharge of *Little*, which, he said, was with no purpose of favoring *Little*, or taking an advantage of *Ellis*, but only to secure himself.

The answer of *Little* stated, that he was sued to November sessions, 1829, and that in January following in a conversation with *Ellis*, he informed him that he should be pleased if he could get the suit settled, to which *Ellis* replied, that if he would pay the debt to *Barnes*, for

Dec. 1832.

Ellis v. Amason.

which *Ellis* was surety for *Amason*, he thought he could get clear: but that he gave him at that time no notice of an assignment to himself; that at February term, *Price* gave him notice of the transfer to himself, and shewed him the written assignment, and shortly before the trial came on. *Price* and *Ellis* were in private conversation together, and in a little while *Price* informed him, *Little*, that he and *Ellis* had come to an understanding that the suit was to be tried, and *Price* was to be first satisfied out of the recovery, and account for the surplus to *Ellis*; and *Price* further informed him, that he had engaged *Ellis* to attend to the trial, as he was best acquainted with the facts. This defendant denied that *Ellis* then gave him notice of any interest in the claim, and averred, that from the transfer to *Price* in writing, he supposed him to own it exclusively. He then stated the nature of the agreement between *Amason* and *Ellis*, as set forth by the other defendants, as he had since understood it from them. It was then admitted, that on the 26th March, 1830, a settlement took place between him, *Little*, and *Price* and *Amason*, when he discharged the whole debt by paying $554 to *Price*, and the balance of 15 or $20 to *Amason* himself, and took his receipt, which he intended to use on the trial of the suit. He denied all intention to defraud the plaintiff, and said, that he never conversed with *Amason* upon the subject of the claim until the settlement, and *Amason* then averred, that *Ellis* had no interest in it. He further stated, that *Price* was sued as surety for *Amason* for another demand, and that a recovery would probably be effected against him for about $200, which *Little*, as the agent of *Price*, (who had removed,) was to pay. The insolvency of *Amason* was fully admitted.

The depositions of several witnesses proved the acknowledgments, at various times of *Amason* in November, 1829, and thence on to the succeeding February, that he made a verbal assignment to the plaintiff of the note endorsed by *Little* as a counter-security for his responsibility for the debt to *Barnes*. None of them spoke of any further payment to be made for *Amason* on the

ca. sa. or otherwise, but confined the purpose of the assignment to the debt due *Barnes*, which *Ellis* proved he had paid.

Several witnesses were examined as to the notice to *Little*. One of them proved, that after hearing *Amason* in November, 1829, acknowledge the assignment to *Ellis*, he also heard *Little*, during the same week, say that *Amason* had made such a transfer, and that he thought he should get clear of paying any thing. Another swore, that after the trial at February, 1830, *Little* said, that they had got judgment against him, and *Ellis* took an an active part in the management, but that he had appealed, and thought he should cast them. A third proved, that in the spring, *Little* came to *Amason's* and asked for him, and upon some person's enquiring what he wanted of him, he replied, that he wished to see him about the debt he had transferred to *Ellis*, and that he knew they could work *Ellis* about it; and a fourth, that *Little* shewed him *Amason's* receipt, and stated that the suit should be dismissed, and *Ellis* was not as safe as he had thought himself. He then observed, that *Amason* had made a verbal transfer of the debt to *Ellis*, if he would become his surety, but as soon as he got him to court he had surrendered him, and then he, *Amason*, was obliged to apply to *Price*, to whom he gave a written transfer, and that the three, *Amason*, *Price* and *Little* had made a settlement, upon which he got a receipt.

Devereux and *Mordecai*, for the plaintiff.

The Attorney General and *Gaston*, *contra*.

RUFFIN, Judge.—The first observation called for by the case is, that the statements in the answers, that it formed a part of the contract between the plaintiff and *Amason*, that the former should discharge the latter from execution, is entirely unsupported. No witness speaks of it, and the answers themselves as to that, go out of the charges of the bill, and bring this matter forward as a new and substantive defence. The defendants ought therefore to prove it. They have not been able by any body but themselves, and their answers are not evidence for, any

Dec. 1832.

Ellis v. Amason.

more than against each other. The gross contradictions between them, (to be accounted for perhaps, by the circumstance, that *Price's* answer was drawn at his present residence in Alabama,) may be the reason, and it seems to be a good one, why they have not respectively taken each other's depositions to that and other parts of the case. At present, their case is without evidence on this point.

As the answers of the defendants respectively, are not evidence against the others, each can be charged only on his own answer and the depositions.

The fact of the assignment to the plaintiff, is distinctly proved by several witnesses, as early as November, 1829, and this is evidence which affects all the defendants as to that fact, and as to the purpose of the transfer.

The answer of *Price*, contains a distinct acknowledgment of notice of this assignment, qualified indeed by stating other terms besides those alleged by the plaintiff, but without any support as to that qualification. And the whole is put beyond a doubt as to him, by the fact, admitted by him, that *Ellis* had the paper in his possession, which no doubt, caused him to be so anxious to obtain a written assignment, though advised by counsel that a verbal one would be equally good against *Amason*.—Under these circumstances, the subsequent receipt of the money, charges him to the full extent of the plaintiff's demands; that is, for the debt paid by him, and interest and reasonable expenses incurred, or to be incurred, in the prosecution of the suit at law, of which an account must be taken. *Price* is thus chargeable, whatever may be the issue of the suit against *Little*; for he cannot say that *Little* did not owe the debt, though *Little* himself may. *Price* has received it, and he received it in trust for *Ellis*. But as that may not be an effectual security to the plaintiff, he has also a right to proceed at law against *Little*, notwithstanding the payment to the others, if made with notice of *Ellis'* rights, and in bad faith.

Upon the question of notice, the court concurs with the counsel for *Little*, that it ought to be plain, positive and direct information. A rumor, or that which might

Notice of the assignment of a bond, should be direct, in order to charge the obligor with a wrongful payment of it; but notice may be proved otherwise than by a personal communication from the assignee.

pnt men upon enquiry in ordinary cases, will not do to affect a debtor with notice of the assignment of a *chose in action*. Debtors are bound to seek their creditors, but they are not bound to search the world, but may pay the original creditor, unless distinct notice of the rights of the assignee be brought home. But that need not be by proof of such notice from the assignee personally, though in general, it is safest and would be required except in those cases of palpable collusion to arrange the demand with the sole intent of defeating the assignment. Such conduct is in itself evidence that a personal demand has been made, or whatever is necessary has been done. If, for instance, the original creditor inform the debtor that he has made a parol assignment, and for that reason, he cannot give up the note which he delivered to the assignee, and, in order to defeat it, seeks and obtains payment, it is a case of plain fraud, which carries conviction with it, and dispenses with further proof of notice.

Such I conceive this case to be. The witnesses speak precisely to *Little's* declarations of his knowledge of the plaintiff's assignment, and of his efforts to get a receipt from *Amason*, expressly with the view to defeat it, and boasting that he had done it. And although his answer affects to deny notice, his own statements corroborate the testimony. The denial is special, that *Ellis* did not give him notice, but not that he had none from any other person. He admits too, that when *Price* shewed him his assignment, (which *Price* says he never even informed him of,) he understood that *Ellis* had a prior claim, but that *Price* and *Ellis* had come to some arrangement between themselves; and he admits, that the latter conducted the trial. But above all, the circumstances of the settlement are convincing. He says, that he settled in March, within a few weeks after taking the appeal, which he had expressed such strong hopes of prosecuting successfully, and that he paid the full amount of the former recovery. This is most unusual conduct in a person who has been harrassed at law. So unusual as not easily to be credited, unless in making the settlement with that person, he was gaining some advantage which he could

Dec. 1832.

Ellis v. Amason.

not expect, if made with another, or with the view of particularly accommodating the individual with whom the settlement was then made, or defeating another. I doubt but little, that all these motives concurred upon this occasion, for *Price* seems to have left the state immediately, and *Little* admits himself to be his agent; and the purpose was to put, or pretend to put into *Price's* hands the whole sum, that it might be out of the reach of *Ellis*—all thinking that *Amason's* receipt would defeat the suit, and consequently defeat *Ellis*. They settled upon terms to suit each other, and *Amason* got his share, though a small one. *Little* repeats, that *Amason* then told him, that *Ellis* had no interest. How came he to make that enquiry? Or the other to volunteer the information? But why did he not ask for the note on which he had given his endorsement or guaranty? That would have been a much more effectual discharge than a release, and would have disposed of the suit without the trouble of pleading and calling witnesses. The circumstances seem conclusive to establish his perfect knowledge of the plaintiff's claim, and of the dishonest purpose to embarrass and frustrate him. He well knew, that those men, with whom he was settling, had not the right; and he ought not to use the acquittance obtained from them. The injunction must therefore be continued, and the parties be at liberty to move for further directions after the trial at law, and in the mean while, an account be taken of the plaintiff's demand.

Per Curiam.—Declare, that the assignment mentioned in the pleadings to have been made of the note also mentioned in the pleadings to the plaintiff, is established; and that the defendant *Price* had notice of that assignment, when he took one to himself, and that his subsequent receipt of the money due upon the note from the defendant *Little*, makes him a trustee thereof for the plaintiff. Declare further, that the defendant *Little*, had notice of the assignment to the plaintiff, at the time he made the payment mentioned in his answer, and that said payment was made in bad faith, and with the fraudulent intent of defeating the plain-

tiff of the benefit of the assignment made to him, and that the plaintiff hath a right, notwithstanding the said payment, to prosecute the action at law, for the purpose of indemnifying himself out of the judgment for his suretyship, and the costs of prosecuting the said suit, unless he be paid the amount of the said note by the defendant *Price*. Direct an account to be taken of the amount due the plaintiff, and let the injunction heretofore granted be continued, and let the defendant *Little* be restrained from pleading or offering in evidence upon the trial of the said suit at law, the release obtained by him from the defendant *Amason*, and reserve the cause for further directions.

JOHN W. POTTS *et al.* *v.* THOMAS TROTTER.

A trustee who is obliged to employ an agent, and does so in good faith, is not responsible for any loss to the trust fund, arising from the subsequent insolvency of the agent.

This was a bill filed by the plaintiffs as executors and residuary legatees of *Ralph Potts*, deceased, against the defendant, also an executor, praying an account of monies received by the defendant under an assignment by one *Scott*, of three vessels and their cargoes, upon trust to pay a debt due him, and after the satisfaction of that, a debt due the testator.

The defendant in his answer, submitted to an account, and a reference was made by the court of Equity for the county of Beaufort, and a report was filed at Fall term 1829, from which, and the pleadings in the cause, it appeared that the defendant, who resided in Beaufort, had insured one of the vessels assigned to him, in Norfolk; that he had employed one *Armistead*, a man then in good credit, to effect this insurance, and not having the money, had sent him, *Armistead*, his note for the premium, which had been subsequently taken up; that the vessel and her cargo was lost, and after a tedious law-suit, a recovery was effected upon the policy; that it was then

Dec. 1832.

Potts v. Trotter,

discovered, that *Armistead* had never paid the insurers the amount of premium, but was dead insolvent, and it had been deducted from the amount recovered. The commissioner allowed the defendant the amount thus paid by him to *Armistead*, and charged him with only the nett sum received from the insurers. The plaintiffs filed several exceptions, which it is unnecessary to state, further than that the first presented the question as to the propriety of the above allowance of the commissioner.

Gaston, for the plaintiffs, moved at this term, to be allowed to file additional exceptions, supporting his motion by a reference to the report, and the exaggerated amount of sundry allowances made the defendant, to which he intended the proposed exceptions to apply.

Hogg and *J. H. Bryan*, for the defendant.

Ruffin, Judge.—The first exception of the plaintiff is founded on the idea, that as the premium of insurance was deducted by the insurers when they paid the loss, *Trotter* cannot be allowed for it again as having been previously paid to *Armistead*.

Armistead was the agent of *Trotter* to effect the insurance; to whom the latter, not having the money by him sent his note for the amount; and instead of paying *Trotter's* note to the company, he kept it and gave his own. *Trotter* in due time, remitted cash to take up his note, but *Armistead* did not pay it to the insurers, and converted it to his own use. When the loss afterwards arose, the amount of *Armistead's* notes for the premium was taken out of the sum assessed for loss, according to the usage in such cases; and was lost to all parties by the failure and death of *Armistead*.

Trotter was under the necessity of employing an agent to effect the insurance, and the evidence is, that *Armistead* was in good credit, both in point of ability, and personal character. It was in the usual course to send him the money to make the payment subsequently, nor does it appear that *Trotter* knew or had reason to suspect that payment had not been made to the insurers, until the failure of *Armistead* and the loss, had both happened. *Trotter* acted in good faith and in the common

course of those who have to effect insurance at other places; and is entitled to a credit for the money paid to *Armistead*. Some difficulty has been made upon the question of fact, whether *Trotter's* note to *Armistead* was for the premium. But there seems no reason to doubt that. The sums do not agree precisely; but are so near that a small commission, postage and the like, might make the difference. And it seems certain that *Trotter* must have given that note, or another sum in cash, to *Armistead* for the notes of the latter, which were given for the insurance. Money was not paid to the insurers, but *Armistead's* notes were deposited as a security. How were they obtained? *Armistead* would not have given them without a counter security from *Trotter*. That he had in *Trotter's* note to him and the subsequent payment. The *first* exception is therefore overruled.

A party having filed exceptions, will not be permitted to extend them, unless originally prevented from completing them by accident or surprise.

The counsel for the plaintiff has applied for leave to file fusther exceptions. This application is not founded upon an affidavit setting forth any special grounds, as surprise or accident, which prevented him from excepting to the items now objected to, when he excepted to others; but merely on the unreasonableness of the allowances themselves. The application must be refused. The order of proceeding is essential to a right decision. Parties have a right to know the points in controversy, and the court has a right to require that their attention shall be directed to the questions to be contested. The same reasons which would prevent the court from looking into the accounts without any exception, forbid an exception to be now taken upon such a gronnd; for that would be to leave the whole matter open to the last moment, and would be a surprise on the other party, and a great inconvenience to the court. Exceptions must be taken at the proper time, and parties must know, that the court cannot take care of them, if they will not take care of themselves.

Per Curiam.—Let the first exception of the plaintiffs be overruled, and their motion to file additional exceptions, be disallowed.

Dec. 1832.

The Bank of Newbern v. Henry A. Jones *et al.*

Where two creditors obtained judgments against their common debtor, at the same time, and the clerk wrongfully issued an execution to one of them, whereby the other obtained a priority; in the absence of a fraudulent combination between the clerk and the creditor thus preferred, a court of Equity will not deprive the latter of the advantage he has thus gained.

The bill which was filed in Craven, charged, that writs of *scire facias*, returnable to the August sessions, 1829, of Craven County Court, issued against the heirs of *John Harvey*, upon two judgments obtained by the plaintiffs against *Mary Harvey*, a defendant, his administratrix, in which the issue of fully administered had been found for the defendant, whereby the plaintiffs sought to subject the real assets of the intestate in the hands of his heirs; that at the same term, a similar *scire facias* issued upon a judgment in favor of the defendant *Jones;* that *James G. Stanly*, the clerk of the County Court, and also a defendant, was one of the heirs of *John Harvey*, and the agent of his administratrix; that judgments were rendered for the plaintiffs in those suits at the return term; but that some of the heirs of the intestate being infants, appeared by their guardian, the defendant *Mary;* that a combination had been formed between the defendants *Jones* and *Stanly*, to give the former a preference, so that he might obtain satisfaction from the real assets of the intestate, to the prejudice of the plaintiffs; that in execution of this combination, the defendant *Stanly*, as clerk of the County Court, and agent of the defendant *Mary*, made an entry upon the record of the judgments in favor of the plaintiffs that execution thereon was staid according to law, and on that of the defendant *Jones'* judgment, that the stay of execution was waived by the defendants, and immediately afterward issued a writ of *fieri facias* on the latter judgment; that the plaintiffs then demanded writs of *fieri facias* upon their judgments, which were refused because of the stay abovementioned; that all the parties desiring to have their rights ascertained, it was agreed to present the questions

between them to the Judge of the Superior Court of Craven; that accordingly, at the ensuing term of that court, the plaintiffs applied for a *mandamus* to the defendant *Stanly*, commanding him to issue writs of *fieri facias* upon the judgments in their favor, or if they could not succeed in this, that a *supersedeas* might issue as to the execution of the defendant *Jones*; that the Judge of the Superior Court refused the *mandamus*, but awarded the *supersedeas*, from which order, both the plaintiffs and the defendant *Jones* appealed; that at December term, 1830, of the Supreme Court, the orders made in the court below were reversed, and the *mandamus* directed to be issued and the *supersedeas* set aside; (*Vide* 2 *Dev. Rep.* 476.) that while this litigation was pending in the Supreme Court, the defendants *Jones* and *Stanly*, in the prosecution of their combinaton, had issued and had a levy returned upon the *fi. fa.* of the former, so that when the plaintiffs only had writs of *fieri facias* upon their judgments, the defendant *Jones* had a *venditioni exponas* upon his, and that thereby he had obtained an unjust and iniquitous priority over them. The bill then charged that the defendant *Stanly* was insolvent, and unable to answer to the plaintiffs for any judgment they might recover against him, and that if they were driven to an action upon his official bond, the damages which they might recover would be an inadequate compensation to them, and prayed a discovery and an injunction against a sale under the *venditioni exponas* in favor of the defendant *Jones*, and that he might be compelled to waive the priority he had obtained, and take out a *fi. fa.* bearing even *teste* with that of the plaintiffs.

The defendant *Mary Harvey*, in her answer, denied any fraudulent contrivance, either by herself or by her agent, the defendant *Stanly*. But she admitted that she was desirous of giving a preference to the defendant *Jones*, who was a creditor of her intestate, and had received but a small portion of his debt, whereas her intestate was but a surety for the debts due the plaintiffs, who had, from the personal estate received a large portion of their claim; that under these circumstances, she

Dec. 1832.

BANK OF NEWBERN v. JONES et al.

instructed her agent and her counsel to give the defendant *Jones* a preference, provided it could be legally and honestly done; that being ignorant of the mode by which this could be effected, she had taken no part in the arrangement of it, but had sanctioned what had been done by her agent and counsel.

The defendant *Stanly*, in his answer stated, that being the son-in-law of the defendant *Mary*, he had aided her in administering the effects of her intestate; that he had no consultation with the defendant *Jones*, or the defendant *Mary*, as to any plan by which the former might obtain a priority over the plaintiffs; that the first he knew of such an attempt, was from a suggestion of the administratrix, that she wished it might be done, as the debt of *Jones* was for services rendered her intestate, and that of the plaintiffs' was founded on his being a surety to them for another person; that all the judgments mentioned in the bill when entered up, were accompanied with an entry of a stay of execution for twelve months, which had been universally the practice in that court for twenty years; that afterwards, and during the same term, the attorney of the heirs of the intestate, by an entry in his own hand-writing, made with his consent as one of the heirs, waived the stay of execution as to the judgment of the defendant *Jones*; that after the August term, 1829, of the County Court of Craven, the defendant *Jones* called at his office and enquired what was the situation of his suit against the heirs of *John Harvey*; and upon being informed of the facts above-mentioned, requested him to make out a writ of *fieri facias* upon the judgment, and hand it to the sheriff, which was done according to the established custom of the office; that afterwards he was applied to by the counsel of the plaintiff for writs of *fieri facias* upon their judgments, which he declined issuing, because of the entry above-mentioned, whereby executions thereon were stayed; that the counsel thereupon gave him in writing, notice to do so, which was accompanied with the reasons upon which it was thought the plaintiffs were entitled; but that he still doubted of the propriety of issuing the

executions, and being apprised that the question would be presented to the next Superior Court, he concluded that it was safest for him to await the decision which would then be made, especially as if it should be in favor of the plaintiffs, they would not loose their priority, if their executions were issued after the next term of the Superior Court; that after the refusal of the judge to award a *mandamus*, the plaintiffs applied to the County Court for an order upon the clerk to issue their executions, which was also refused. He denied all combination with the defendant *Jones*, and averred, that but for the entry waiving the stay of execution in his case, he should not have issued one on his judgment.

The defendant *Jones*, also denied any combination, and averred that he did not know of the entry waiving the stay of execution on his judgment, until after the term of the County Court when it was made, and that he had before that time, no expectation of having a priority given him; that after the term of the County Court at which the judgment was entered up, he called at the clerk's office, and ascertaining the facts, he ordered out an execution upon his judgment. He expressly denied any agreement to submit the question to the Superior Court, or in any way to injure the priority which he had gained. He stated that for the purpose of preserving his priority, he had his *fi. fa.* returned, and sued out a *venditioni exponas*, and that he forbore to press a sale, because he was advised that he might postpone it and not thereby loose his priority.

A replication was filed to the answers, but no depositions taken. Copies of the record of the several judgments were filed as exhibts.

By an interlocutory order, the sheriff was directed to sell, and pay the amount into the office of the clerk and master.

Gaston, for the plaintiffs.

J. H. Bryan, for the defendant *Jones*.

W. C. Stanly, for the other defendants.

Dec. 1832.

Bank of Newbern v. Jones et al.

Ruffin, Judge.—The form of the proceedings at law gave to the defendant *Jones*, the advantage of acting on his execution before the plaintiffs could regularly communicate to the County Court the judgment of this court upon the several appeals mentioned in the pleadings.—The bill does not, and could not properly complain of that in itself. But it alleges that there was an agreement or understanding, that the rights of the parties should then abide the opinion of the court upon the question whether the parties were originally equally entitled to immediate execution. Such an agreement would certainly give the plaintiffs the equity claimed by them. The conduct of *Jones*, in not selling pending the appeal, affords by itself, a fair ground to infer such an agreement. But that is the only evidence of it, and that inference is entirely rebutted by the express and positive denial by this defendant of such an agreement or any other, by which would be given to the judgment of this court, any other effect than by its own force it would have. His appeal from the order of a *supersedeas*, left him at liberty to continue his process of execution. He did continue it pending the appeal, for the purpose, as he says, of preserving the preference he then supposed himself to have. He admits he did not proceed to a sale, but he avers, that he refrained solely upon the ground, that the judgment might be against him, and not because of a new contract, of which he denies the existence altogether.

An agreement between two creditors, to refer the decision of their rights to a court, will in equity, prevent either of them from acquiring a priority, pending the reference.

It is however, chiefly insisted for the plaintiffs, that there was a combination of the defendants to give *Jones* an undue preference, by entering the judgments in such manner as would apparently justify the clerk in refusing to issue the execution of the bank, and in issuing that of *Jones* immediately, and that accordingly *Stanly* did so act in reference to the executions.

It is to be considered, how the facts assumed in this proposition are in reality, and also how far the conclusions of law are correct.

Supposing that it were in the power of the parties to give the preference alleged, it becomes a question,

(without now adverting to the official character of Mr. *Stanly*,) whether a court of Equity could relieve against it. It is quite unnecessary at this day, to discuss the considerations which may in conscience justify the satisfaction of one creditor, to the total disappointment of another; or, on the other hand, review the arguments upon which courts of Equity have adopted the maxim, that equality is equity. It is perfectly settled, that at law, an insolvent debtor, or his executor or heir, may pay which creditor he chooses. This court acts upon its own maxim, when called on to apply a fund, the subject of its own exclusive jurisdiction. But it has never been able to restrain the exercise of the power at law. This is not because it is a just right of the person exercising the power. He may perhaps have acted against sound morals. Possibly the disappointed creditor may be an infant ward, or otherwise the most meritorious. Or perhaps nothing may justify the dealing with an unequal hand with creditors. Yet it is allowed to stand here, when the law permits it. Why? Only because the favored person has got nothing that was not due to him. Being a just creditor, he can with a safe conscience keep as much of his debt as he can get. There is no equity against him. Each creditor takes care of himself, and is not charged with the interest of the other, when there exists between them no other connexion but that of being the several creditors of the same insolvent. The mere fact of the preference of *Jones*, if such had been gained by the method of letting the judgments pass, does not render him liable to share with the plaintiffs.

If a debtor can, at law, give one creditor a priority, a court of Equity will not restrain him from doing so.

Because the favored creditor gets nothing but what he has a right to receive.

But in truth, no such preference was obtained, however it may have been designed. No doubt that was the design of the defendants Mrs. *Harvey* and Mr. *Stanly*. But the attempt proved ineffectual. The opinion of the Supreme Court determines conclusively, that notwithstanding the forms of entering up the judgments, the bank was entitled to immediate execution as well as *Jones*. The plaintiffs might have demanded, and did demand execution forthwith, and after the decision of the Supreme Court, again demanded it.

Where two creditors are equally entitled to executions, and the clerk refuses to issue in favor of one of them, it is not a case of preference.

Dec. 1832.

BANK OF NEWBERN v. JONES et al.

To these demands, the clerk returned positive denials, although at the time of the last he was informed, not officially, of the opinion of this court.

I think the case is reduced to the single enquiry, how those denials and the subsequent conduct of the parties affect them respectively.

There is nothing to charge Mrs. *Harvey* with a knowledge, much less a concurrence in this part of the transaction.

The acts of the clerk are plainly wrongful. He was guilty of an official malfeasance, and is responsible for it.

It is insisted further, that the defendant *Jones* cannot, with a safe conscience, take benefit from that wrong.

And *it seems*, that the creditor has no redress against the other, unless perhaps where the latter induced the clerk not to issue the execution of the first.

If there were evidence that *Jones* participated in the wrong, by advising or procuring the clerk to refuse the plaintiffs an execution, it would be necessary to consider the effect of such active interference. Perhaps it might be distinguished from the common case of a sheriff paying money upon indemnity, or otherwise, to an execution creditor, who was not entitled; in which, the sheriff is clearly liable, but in which, there is no adjudication of relief at law or in equity, as between the creditors. If there were a remedy for the one creditor against the other, it would seem to be at law, and upon this ground, that one had received more than by law he was entitled to. But no case of the sort is found; nor any, where the satisfied creditor has been made to reimburse to the sheriff, the money he has been compelled to pay to the other creditor. In other words, the sheriff acts upon his own responsibility, and must answer without reference to inadvertence or mistake on his part, or he must provide an indemnity for himself by contract. I do not perceive any solid distinction between the two cases. But this cause does not at all depend upon that analogy, and is decided without reference to the rights and liabilities which might arise upon a state of facts, shewing an active participation in the refusal to give the plaintiffs their execution.

The least incitement or suggestion on the part of *Jones* to the clerk to that effect, is explicitly denied by

Jones, and disclaimed by *Stanly*. All the former did, was to sue out his own execution. That, he had a right to do. He did not interpose the slightest obstacle in the way of the other creditor. There is no fault in *Jones* in this respect. It is that of the clerk exclusively. Whatever aid a sense of private justice may prompt *Jones* to extend to *Stanly*, upon the score of the benefit accruing to him from the others default, I do not see that he is liable to either party upon legal principles. For *Stanly* avows, that he acted on his own opinion; and it is to be collected, that if *Jones* had requested the clerk to issue the plaintiff's execution, he would likewise have refused, because he thought it to be his duty to refuse. As a creditor preferred, and even improperly gaining a preference by the default of the officer under these circumstances, the plaintiffs have not an equity against *Jones*; because, he has committed no wrong, and because they have a direct and complete remedy against the officer himself. The question is not one of loss between the creditors, for neither of them can lose any thing. The question is between *Jones* and the officer—which of them shall pay the sum to the plaintiffs, acknowledged by all to be due to them. And upon that, in the actual state of the case, I think there can be no doubt; even should the law be different had *Jones* been accessory to the official malfeasance.

His only remedy is upon the official bond of the clerk.

It was slightly intimated in the argument, that the action against the clerk, might prove to be an inefficient remedy; because it is a question of damages, and the jury might be influenced by circumstances improperly deemed by them to be in mitigation. That would be equally an objection to every assessment of damages. But if it could in any case, it cannot have an effect here, because this is not the case of a vindictive action, but there is a fixed measure of damages, namely, the actual loss sustained by the misconduct of the clerk. Damages in such a case, may be aggravated by corrupt motives, but they cannot be reduced below a real compensation for the injury in fact sustained. A ministerial officer is paid as well for his responsibility as his time and labor,

And the measure of damage, is the actual loss sustained by his misconduct, without reference to his motives.

Dec. 1832.

Bank of Newbern v. Jones et al.

and must therefore answer for all the consequences of his default to the full extent. The plaintiffs then have sustained no loss, as between them and *Jones*, to be made up out of his gains. The plaintiffs have an adequate remedy against another person, for their whole loss. To meet this view of the case, the bill further charges the insolvency of *Stanly*. I do not pretend to say how that might operate, if we could find the fact to be as alleged. But we must take it to be otherwise. The personal insolvency of the clerk, does not materially impair the security of a demand founded on his official conduct. He is required to give bonds with approved sureties annually, and these are all cumulative securities up to the breach. It appears from the pleadings, that *Stanly* has been in office many years, so that it is next to impossible, that insolvency should run through his sureties, and to the present purpose, their solvency is his.

Whether the insolvency of the clerk and his sureties, would make any difference.—*Qu?*

It is the opinion, therefore, of the court, that the plaintiffs have adequate remedy at law against the defendant *Stanly*, and that the bill be dismissed with costs.

Per Curiam.—Bill dismissed.

William Hunt v. Edwin Bass *et al.*

A deed obtained by sureties for their indemnity, under a threat of legal process in case of refusal, cannot be set aside by the bargainor for duress in its execution.

The case made by the bill, answers, and proofs, was, that the plaintiff, having been appointed the administrator of *Coffield Bass*, a half-brother of the defendants *Edwin* and *Gideon Bass*, whose mother he had married, had given the defendant *Gideon* and *Matthew Sykes*, also a defendant, as his sureties; that he had received of the assets of his intestate, about $800. Soon after his marriage, he discovered that his wife had, by a settlement made before it took place, but without his knowledge, conveyed three negroes to her children by her first hus-

band, of which the intestate was one. The plaintiff filed a bill to set aside that settlement, and by the advice of his counsel, procured his letters of administration to be revoked, and one *Hammonds* to be appointed administrator. The next of kin of the intestate were his brothers and sisters of the whole and half-blood, among the latter of which, were the defendants, *Edwin* and *Gideon Bass*. Before the letters to the plaintiff were revoked, he had made payments which reduced the amount due from him to the next of kin. At February term, 1828, of Nash County Court, the plaintiff came to the court-house, where he got very much intoxicated, and lost a large sum of money at cards. The defendants *Sykes* and *Gideon Bass*, hearing of this, demanded counter-security, which the plaintiff gave them by conveying his land and personal property, including the three slaves in dispute between him and the next of kin of *Coffield Bass*, to the defendant *Edwin*, in trust to indemnify them. Before the plaintiff consented to do this, his sureties threatened to take instant measures to have his accounts closed, and the balance collected. A sale of the property conveyed to the defendant *Edwin*, was by him advertised for the 15th of March following, at the plaintiff's house, but was not known to either the plaintiff or to *Sykes*, until within a few days of that time. On that day, the plaintiff requested that the sale might be postponed to the next court-week, which being refused, he asked that his administration account might be settled, in order to prevent the trustee from selling for an amount exceeding the balance; this was also refused, and the sale proceeded, when two negroes which had cost the plaintiff $800, were sold to *Edmund* and *Isaac Bass*, brothers of *Edwin* and *Gideon*, for $477. After this, the plaintiff told the trustee that the amount raised, was sufficient to pay the balance due by him to the next of kin of *Coffield Bass*, and begged that any further sale might be postponed until he could settle with *Hammonds*, who was present; which was refused, and the negroes in dispute between the plaintiffs and the next of kin, were then offered. The plaintiff earnestly requested that they might not be sold,

Dec. 1832.

HUNT v. BASS.

as the doubt respecting the title to them would prevent them from bringing their value, and in lieu of selling them, he asked that other property, the title of which was clear, might be sold. But while the plaintiff and a friend were endeavoring to effect a settlement with *Hammonds*, these slaves were sold at about one tenth of their value, and purchased by one *Moore*, with whom the *Bass's* quarrelled for bidding, and who, in the course of a few days transferred his purchase to the defendant *Edwin*. All the negroes purchased, were held on the joint account of the defendants *Edwin* and *Gideon*, and such others of the next of kin, as chose to claim an interest in them, rather than to receive their share of the surplus in money.

The bill charged, that the deed of trust had been obtained by duress, and prayed to have the sale declared to be void, and the defendant *Edwin* to be a trustee for the plaintiff, and for an account of the hires of the slaves since the sale.

Badger, for the plaintiff.

Devereux, for the defendants, declined arguing the question between the plaintiff and the defendants *Edwin* and *Gideon*, as to the prayer for a re-conveyance; but insisted, that the sureties were entitled to have the deed stand as a security for them, and that *Sykes* was entitled to his costs as he had not in any way acted unconscientiously.

RUFFIN, Judge.—The allegation in the bill, that the deed of trust was obtained by improper means, is not supported. *Sykes* and *G. Bass* had a right to a counter-security, and the dissipation of the plaintiff about that time, made it an act of but common prudence then to apply for it. The witnesses prove, that although the plaintiff had been in a deep debauch, during which he had been plundered at the gaming table, he had so far recovered from it, and regained his faculties, as to be capable of understanding the instrument he executed, which was read and explained to him and understood by him. Then as to the idea of coercion, and that sort of

restraint on his free will, which we look upon here as a species of duress, I must say, that he was asked to do nothing which he ought not to have done. And it was not unfair in the sureties to inform him, as a motive for him to give the deed, that if he did not voluntarily secure them, they would use such other means as the law afforded for that purpose. They do not seem to have done this to alarm a timid man, not aware of his rights and not master of his actions, to gain from him what he would not willingly grant, or they might not rightfully ask; but to have presented the facts to his view as reasonably justifying them in their demand of a security, and as properly inducing him to give it, upon the score of convenience to himself, and justice to them. In fine, the execution of the deed seems to have been voluntary on the part of the plaintiff, and the instrument must be established.

The proceedings under it are viewed by the court very differently. It is clearly in proof, that all the negroes sold, have remained in the possession of *Edwin Bass* ever since the sale, he claiming the ownership in them for himself and others, under the purchase made at his own sale. Two of them were purchased by *Isaac Bass*, under an agreement before the sale, between him and the defendants, *Gideon* and *Edwin*, the trustee, that a purchase should be made of all the slaves for the benefit of the three, and such others of their brethren as chose to come in. This comes precisely within the common rule, that such a purchase by a trustee is void. It is equally so with respect to those who join in the purchase, as with respect to the trustee himself. They have united in an act of fraud and imposition, and all must fare alike. The deposition of *Isaac Bass*, (a party to that agreement,) proves, that *Edwin* has those slaves, as well as the others mentioned in the bill, now in his possession, awaiting the determination of this suit, for a division among them. As *Edwin* has never conveyed, and the sale was void, they remain the property of the plaintiff, liable only as a security for the debts.

Property conveyed to a trustee for sale, and sold by him under an agreement with the vendee, to be jointly interested in the purchase, is subject to the original trust.

The other three slaves are differently situated, which

Dec. 1832.

HUNT v. BASS.

makes it necessary to advert to other considerations.—They were at that time, and when the deed was made, the subject of a suit, in which *Hunt* claimed them on one side, and the *Bass* family on the other. It does not appear, how that controversy was determined, or whether it has been determined. *Hunt* had made payments to some of the next of kin of his intestate, but no final settlement had taken place, nor an account current of his administration made. In a very few days after the deed was executed, the trustee, at the request, as he says, of some of the next of kin, of whom he was one, advertised a sale. He gave no notice of it to *Sykes* or to *Hunt*, who heard of it by accident only a day or two before the sale. On the day of sale, *Hunt* urged that he had made payments, and requested a postponement for a few days, when he would consent to a sale at the court-house on a court day. That was refused. He then requested, that an account might be taken, and the sum due from him ascertained. That was also refused, and the negroes first mentioned, were sold and bought in by *Isaac Bass*, for the trustee and himself and others. The trustee was then about to offer the three negroes, of which the title was in dispute, when *Hunt* repeated his entreaty, that the calculations should be made, so as to ascertain whether there was yet a balance owing by him, and if one should be found, that it might be raised out of a tract of land or other property, of which the title was clear. The trustee did not assent to the arrangement, and while *Hunt* and the administrator had retired to compute the debt, those three negroes were offered as being in dispute, and sold at a great undervalue. They were not bought by either *Bass*, although their agreement extended to them, but were purchased, much to their displeasure, by a Mr. *Moore*, who in a day or two transferred his purchase to *Edwin Bass*, the trustee, and he now holds them, as he does the others, for the joint benefit of himself and his brothers.

A trustee for sale, should be indifferent between the debtor and credi-

A sale thus conducted, cannot be supported in this court. A trustee to sell, should stand indifferent between the debtor and creditor; he is charged with the

interests of both, and should take reasonable care of them. Where there is no absolute necessity for an immediate sale, it is a breach of his duty to bring it on at a disadvantage, unless it was in the contemplation of all the parties to sell at all events, subject to the cloud on the title. And certainly when there is other property with a clear title, that which is in dispute ought not to be sold until the other has been exhausted, especially against the expressed will of the owner. But the circumstances in this case, do not only shew a total disregard on the part of the trustee, of the interests of the debtor, but conclusively prove a design to oppress and ruin him, for the sake of gain to himself and his associates. The time of the sale, without an intimation of it to *Hunt*; the refusal to postpone it even until he could ascertain the sum to be raised; the refusal to sell the land instead of the negroes, although importunately urged to do so by *Hunt* and his friends; and the previous agreement to have all the negroes purchased on the joint account of himself and his brothers, and thereby extinguish the claim of *Hunt*, which they were then contesting at law; all mark the purpose to sacrifice the unfortunate man, who had reposed a misplaced confidence in him.

tor, and should not sell in disregard of the interest of the former, unless it was so agreed.

If the title of some of the trust property is disputed, he should not sell it until the rest is exhausted.

Such conduct amounts to a flagrant breach of trust, and subjects the trustee to the payment of the full value of the property sold, and in that way, *Edwin Bass* would be charged here if necessary; and *Gideon* also, who participated throughout with him in conducting the sale and gaining an interest under it. But as the slaves have been given up by *Moore*, and got back to the hands that have done the wrong, the plaintiff has a right to them specifically. These parties cannot protect themselves under the purchase of *Moore*, even if it were consummated, which is doubtful. When the property comes back to them, they cannot say they ever parted from it, since the disposition was an act of the most aggravated wrong. As to them, the sale was absolutely void.

And the debtor has a right to the trust property which has been improperly sold by him, & which afterwards comes to his hands, or those of his confederates, even if originally sold to one against whom he had no right to relief.

The plaintiff is, therefore, entitled to have an account taken of the debts secured by the deed, and a credit for the full value of the property sold other than the negroes,

Dec. 1832.

Cooper v. Cooper.

and also for the hire of the negroes, and to have a reconveyance, upon the payment of the balance that may be found due.

Per Curiam.—Direct an account.

Edward Cooper v. Elizabeth Cooper.

Upon a bill to set aside a deed as a forgery, the deed being in the custody of the court, and no doubt being entertained of its being forged, yet as the fact was more properly triable at law, an issue was ordered at the election of the defendant.

This bill was filed to set aside two deeds of gift which purported to have been executed by the plaintiff to the defendant, whereby sundry slaves were conveyed to her, with a reservation of a life estate to the donor.

The deeds were impeached as forgeries, and if in the proof of this fact the plaintiff failed, then he contended that they had been obtained by practising upon his great age, and weakness of mind.

There is no need of stating the proofs, which were very voluminous, as the case of the plaintiff was made out to the entire satisfaction of the court on both grounds; the only question being how it was proper to proceed in the cause upon the supposition that the deeds were forged.

The cause was argued by *Badger* for the plaintiff, and *Devereux* for the defendant.

Ruffin, Judge.—Of this case, as it appears in the pleadings and proofs, in point of fact, not a doubt is entertained by any member of the court. There is strong and convincing evidence, that both the deeds set up by the defendant are forgeries; and if they be not, the circumstances, arising out of the age and infirmities of the plaintiff, his ignorance of the whole transaction, and unfeigned surprise when informed of the existence of the instruments, and the conduct of the defendant upon the

interview between herself and her grand-father, when their existence was communicated to him, and the power and influence she had over him, are such as shew a gross fraud on him in obtaining them by the joint contrivance of the defendant and the subscribing witness. The plain ground, however, of relieving against the deeds is, that they appear to be forged. And the difficulty with us has been, how we shall treat such a case. No doubt the court can decree upon the evidence; but the question is, whether it is proper to do so in the first instance, before trying an issue. It is also true, that after a verdict, the court is not bound to act on it, and if it is not satisfactory, may send it back to another trial, or even decree against the verdict. Nevertheless, it seems to be more proper that it should be tried at law first. As a crime, this court has no jurisdiction of the question of forgery. It is exclusively with a court of law. And upon the question of fact, the decision made by a jury upon the examination of the witnesses before them, must be more satisfactory than drawing conclusions from their depositions, especially where much may depend on credit, as does here where two witnesses depose to the fact of execution. It seems to be the usual practice in England, to direct an issue. When the defendant objects to discovery, because he may incur a penalty or subject himself to punishment for a crime, it does not preclude the relief, but the court hears the cause, and orders an issue to be made and tried. That is the uniform course, when there is no answer to put the matter in issue in chancery. Where there is an answer, it also common, though not indispensable, to order a trial at law; as in the cases mentioned by Lord *Hardwicke* in *Brownsword* v. *Edwards*, (2 *Ves.* 246,) and in *Bishop of Winchester* v. *Fournier*, (*Ib.* 445,) *Sir John Strange* adopted the middle course of having the bond deposited with the register, without then declaring it a forgery, but giving the defendant liberty to bring an action within a reasonable time, and if not, then to be delivered up, or cancelled.

This appears to be the proper course in the case before us, which is perhaps as iniquitous a one as could

Dec. 1832.

COOPER
v.
COOPER,

well be imagined. The deeds are now filed, and are ordered to be detained by the clerk, with leave however, to the defendant to try an action of detinue for the slaves mentioned in them, in the Superior Court of Nash county, at next September term, upon three months notice to the present plaintiff, who upon the trial, shall not set up the objection, that by one of the deeds a life estate is reserved to himself; but if the defendant should fail to give due notice of trial, further directions may be moved for by either party immediately, or if she shall give such notice, then, after the trial, or failure to try at the time mentioned. For the purposes of that trial, the deeds may be taken out of the office by the defendant's solicitor, to be by him returned after the next Nash court, and each party is at liberty to read the depositions of such of their witnesses as may then be dead.

PER CURIAM.—DECREE ACCORDINGLY.

MARY S. CLARKE *et al.* v. SPENCER D. COTTON *et al.*

A legacy, where the legatee is not described so as to take, sinks into the residue; but one given by a description which applies to several, goes to the sovereign as derelict.

After the decree pronounced at June term, 1831, (*ante p.* 51,) this case came on for further directions upon the report of the master stating, that by the fifteenth clause of her will, the testatrix devised as follows: "I give to "*Martha Barrow*, daughter of *Bennet Barrow*, Esq. "four hundred dollars." By the twenty-ninth clause, she gave to *Elizabeth Hunter* five hundred dollars. Mr. *Barrow* had not at the date of the will, nor ever had, before or since that time, a daughter called or known by the name of *Martha*; he had two daughters named *Margaret* and *Olivia*. No evidence was before the master, that either of these were intended by the testatrix to be described by the name of *Martha*.

Upon the other clause, the master reported, that there were many persons known by the name of *Elizabeth Hunter*; but that it was entirely uncertain who the testatrix alluded to.

There being a deficiency of assets to pay the pecuniary legatees, *Devereux*, for them, moved for directions to divide the two sums mentioned in the report, between them *pro rata*.

HENDERSON, Chief-Justice, after stating the facts above mentioned, proceeded: As to the legacy to *Martha Barrow*, there being no testimony, if admissible, to prove the identity of the person intended, and the question being presented on the will and facts before stated; it is but common learning to pronounce the bequest to be void for uncertainty. There is no legatee designated by name, or by any other description. The bequest is therefore void, and the case is to be considered as if it had never been made. It is property undisposed of, and is to be taken to pay general legacies, and if not needed for that purpose, it sinks into the residuum.

Dec. 1832.

LITTLEJOHN v. ISLER.

Upon the other clause of the will, it being as yet entirely uncertain, who is the *Elizabeth Hunter*, intended by the testatrix, it is unlike the case under the fifteenth clause. For here a legatee capable of taking, may yet appear. The ambiguity arises from the fact, that there are many answering to the description, and it may be shown by parol evidence, which of them the testatrix meant. The legacy then, is not property undisposed of, but property given to a person who does not yet appear. It must therefore, be kept for her, and if after a reasonable time, it be not claimed by the legatee, it goes to the sovereign as the trustee of all derelict property. In this state, the Trustees of the University have succeeded to this right of the sovereign, and at a proper time, they can claim the legacy.

PER CURIAM.—DIRECT ACCORDINGLY.

JOSEPH B. LITTLEJOHN v. JESSE ISLER.

Where A. sold land to B. for $5,100, with a permission to make a payment of $1,500 by a conveyance of two tracts of land in Tennessee, which should be of the value of three dollars per acre according to the locator's valuation; upon a bill by A. claiming the $1,500 in cash, it was held, to be an executory agreement for an exchange of land, and that the default of B. in making the conveyance, and the want of a locator's valuation were matters of compensation.

The defendant purchased of the plaintiff a house and lot in Granville, for which he was to pay, $5,100, part in cash and the residue in property, among which were two tracts of land in Tennessee, one containing 357 and the other 274 acres, which were to be of the value of three dollars per acre according to the locator's valuation, and were estimated in making up the purchase money at $1,500. A memorandum of the agreement was written and delivered to a third person for safe keeping.

The plaintiff admitted that the defendant had performed all his stipulation, except making him a title to the

land above mentioned; that he the defendant had no title to one of the tracts, and that it never had been valued by the locator. He alleged that he had, from misplaced confidence, consented that the agreement should be delivered to the defendant. The bill prayed that the plaintiff might have a decree for the stipulated value of the land, or such relief as he was entitled to.

The defendant admitted that he had not, at the time of his answer, procured a grant for the tract of 357 acres, and that it never had been valued by the locator, but he insisted that it was of the stipulated value, and that it was not valued at the time of its location, by mistake.

At the hearing, the defendant filed grants to himself for both the tracts, and a deed of bargain and sale from him to the plaintiff.

Gaston and *Devereux* for the plaintiff.

Badger for the defendant,

DANIEL, Judge, after stating the case, proceeded: The defendant has now a good title to the lands. The circumstance of the locator's valuation not being endorsed on the entry of the 357 acre tract, is not such a misrepresentation as will authorise the plaintiff to waive the contract, which binds him to take the two tracts of land as part payment of the $5,100. As the defendant can now make an unexceptionable title to the two tracts of land, there would be no difficulty in decreeing the plaintiff to take them in payment of the $1500, according to the agreement, if the locator's valuation of three dollars per acre, had been endorsed on both the entries. The plaintiff contends, that the 357 acre tract, is of little or no value. The defendant insists, that although the locator did not endorse on the entry any valuation, yet, it is land of that description that would have been valued by the locator, at the location, at three dollars per acre. From the interpretation which we think should be put on the contract, and in the absence of proof of any such misrepresentation as can operate to the injury of the plaintiff, we think that the latter shall be compelled to

Dec. 1832

Littlejohn v. Isler.

take a conveyance of the two tracts of land, but that it shall not operate as a complete discharge of the defendant from the entire payment of the $1500 mentioned in the agreement, unless the master shall report that the 357 acre tract is of that quality and description, which would at least have been valued at three dollars per acre, at the time of its location. We think that if the land is of a quality that would not have been valued by the locator at the time of location, at the price of three dollars per acre, then the defendant shall make up the difference in money. The bill will be retained, and it is ordered that the master enquire into the valuation per acre of the 357 acre tract, at the time it was located.

Ruffin Judge.—The construction which the Bill attempts to put upon the contract is, that it was a purchase by the defendant of the plaintiff's house and land at a certain price in money, to be discharged in part, on certain conditions, in lands; and the plaintiff is not now bound to take the land but is entitled to money, because the conditions have not been strictly performed. This construction cannot be supported. It is one of those hard and rigorous interpretations, which equity says, it is against conscience to make. The substance of the agreement is for the land on both sides; and is the common case of an executory contract, which will be specifically decreed here. It is however mainly insisted, that the agreement was for lands of a particular description, and that complainant is bound to receive none but such as come within it. It might be very necessary to consider the effect of this position, if the covenant extended to lands generally; in which case perhaps the defendant must be held to have undertaken to procure such as he stipulated for, since the plaintiff had no opportunity of exercising his own judgment at all as to particular land at the time of entering into the agreement. But here it is clear that these identical lands were the subjects and exclusively the subjects to which the parties had reference. They do not say, the sum of $1500 is payable in any land to be valued to

that sum, without regard to situation, quantity or quality; but in *two* tracts, *each* of a *particular number* of acres and both then owned by the defendant and situate in Tennessee. These then were the very lands contemplated. And the question is brought down to the common one, whether the vendor has described them to the vendee as having particular qualities, which were essential to the purpose of the vendee in the purchase and without which he would not have bought them at all, because they were of no value to him; or whether the difference between them as described and as they turn out in fact to be, affects their value to the vendee only in such way as admits of compensation. Upon that there seems to be no reason to hesitate. They were described as having been valued by the locators at $3 per acre. They had not been so valued. But they yet may be; and they may now turn out to be of that quality, which locators at the time valued at that price, or if they should not, the difference must be made up. A variance in this respect is not a ground for rescinding the contract, but admits of compensation; and such compensation must be taken when the amount shall be ascertained by the master, to whom also either party may have a reference of the defendants' title. It is a total perversion of the contract to say it was for money, or is now for money, for aught that has been made yet to appear.

PER CURIAM.—DIRECT A REFERENCE.

JAMES H. MARTIN *v.* DANIEL GOULD, *et al.*

In a gift by will to a child and grandchildren "equally to be divided," each of the latter take equally with the former, unless a different intention is inferred from other parts of the will.

This bill was filed by the executor of *Daniel Gould*, sen. to have a construction put upon the will of his testator. The will after giving all his estate to his wife for life, proceeded thus: "after her death it is my desire

Dec. 1832.

MARTIN v. GOULD.

"that all my estate both real and personal shall be sold "at twelve months credit, and when the money is col- "lected for the land, the average value of one hundred "acres to be given to my son *Daniel* in order to make "him compensation for one hundred acres of land "which I gave to my son *Malachi Gould*. All the rest "of the money that is left, to be equally divided between "my son *Daniel* and my three grandsons to wit, &c. (na- "ming them,) to them and their heirs forever." The defendants were the testator's son *Daniel* and his grandsons mentioned in the will who were the sons of *Malachi*. The only question was whether the residue should be divided between them equally, or whether one half should be given to *Daniel* and the other to the sons of *Malachi*.

Mendenhall for the plaintiff.

No counsel appeared for the defendants.

RUFFIN, Judge.—Probably upon the authorities the construction of the residuary clause, standing by itself is, that the grand sons do not take as a class, but each of the three named take an equal share with the uncle. But what is doubtful here, is cleared up by the clause immediately preceding, which gives out of the aggregate fund before the division, when the money for the land shall be collected, the average price of 100 acres to *Daniel* the son, "in order to make him compensation for 100 acres which I gave to my son *Malachi*." This shows that the testator meant to deal equally between his two sons; and to make the children of his deceased one stand in their father's stead, and that the grand sons take their share as grandsons. Upon the whole will therefore it must be declared, that *Daniel* the son of the testator is entitled to one half the residue, and the three grand sons to the other half, to be equally divided between them, as they shall come of age. And the costs of this suit must be paid out of the fund in the hands of the executor.

PER CURIAM.—DECREE ACCORDINGLY.

Dec. 1832.

John Bullock v. Richard Bullock, *et al.*

The executor of a will which is of doubtful import has a right to apply to a court of equity to have it construed, and its trusts declared.

William Bullock, late of Granville county, duly made and published his will, whereby he devised as follows:

"I give my daughter *Susan Jiggits*, the 12 negroes, "and stock of horses and cattle, household goods, &c. "put in her possession on her marriage with Dr. *Wm.* "*Davis*, also one thousand dollars, which was appropria- "ted to the payment of Dr. *Davis*' debts as executor to "his estate after his death, which money was credited "said estate in settlement of account.

"I give unto my grandson, *Wm. B. Inge*, the 14 ne- "groes lent to his mother *Elizabeth Inge*, with all the "stock and household furniture put in her possession at "her marriage with Dr. *R. Inge;* the negro property, "I have heretofore made my grandson, *W. B.* a deed of "gift for, which is in full of the legacy to my said de- "parted daughter *Elizabeth*.

"I give unto my son *John Bullock*, the eight thousand "dollars furnished in establishing him with a store in "Clarkesville in 1818, which has been paid over to "him, also, *Squire* and *Charles* being a part thereof; "also a house, lot, furniture &c. furnished, all of which "I hereby give him and his heirs forever in like manner. "I now give him four thousand dollars to be made out "of the first money that is made after paying all the "debts that may be owing by the concern of *Bullock &* "*Norwood* in Warren, North-Carolina.

"I give unto my son *Richard*, 8000 dollars and pro- "fits proceeding therefrom, as settled by us at the dis- "solution of our business in 1825, which may be seen "in *Wm. & R. Bullock's* Ledger C, also, &c. to him and "his heirs forever.

"I give unto my daughter *Lucy Lewis*, the fifteen ne- "groes I placed in her possession at her marriage with "with Mr. *N. M. Lewis*, with &c. to her and her heirs "forever.

Dec. 1832.

Bullock v. Bullock

"I give unto my son *James M. Bullock*, my two black-
"smiths, *Peter* and *Tom*, with the black-smith's tools
"and seven thousand dollars to be made out of my es-
"tate to be paid to him by my executor whenever my
"son *James* marries, or arrives at the age of twenty
"years, (to have interest from the time of my decease)
"or at a sooner period, should my executor think it
"would be to *James'* interest to have it; I also give
"him &c.

"I also give unto my wife *Lucy* and son *James*, the
"part of the tract of land I now live on, lying on the
"south side of the road leading from Capt. *W. Norwoods'*
"mill to Shilo meeting house being part of &c. with all the
"negroes thereon, except those heretofore given, &c. *Ga-
"briel, Joe, Silvey, Creatia* and boy child *Mick, Bob, Jenny
"& son, Dele* (Culbreath,) the balance of negroes on said
"plantation, about fifty one or two in number, with all
"the stock thereon not heretofore given, household and
"kitchen &c. all of which is given during the natural life
"of my wife *Lucy*, and at her death I give the land to my
"son *James* his heirs and assigns forever. Should my son
"*James* marry, or should there become any discontent
"between my wife and son *James*, I would recommend
"to my executor to have a comfortable house built, but
"not very costly, on some part of the land for either
"party, as will be most advisable; and let there be a
"division of these fifty two or three negroes, *James* to
"have one third of them, my wife two thirds.

"I give unto my sons *John*, *Richard*, and the heirs
"proceeding from the body of *William H. Bullock*, the
"tract of land lying on the north side of the main road
"leading from, &c. to them and their heirs forever.

"I give unto my son *John Bullock* in trust for the ben-
"efit of the heirs of my daughter *Fanny Ann Hunt* the
"fifteen negroes I put in her possession at her marriage
"with Capt. *J. Hunt*—also the tract of land whereon
"Capt. *Hunt* now lives containing 585 acres. I give
"the stock of horses, cattle, and household furniture
"loaned *John* and *Frances*, in the same manner to them
"and their heirs forever, to the heirs proceeding from

"the body of my daughter *Fanny Ann*; but be it under-
"stood as I have advanced money and paid for this land
"given the heirs of *Fanny Hunt*, there will be a draw-
"back on those legacies which I may give to the said
"*Fanny Ann*, and it will be understood that each lega-
"tee must make up these debts and have so much dis-
"counted in their ratio at the division of my estate, that
"each legatee may share and share alike.

"I give unto my son *John Bullock*, in trust neverthe-
"less for the heirs of *W. H. Bullock*. the interest I pur-
"chased of Col. *John Baptist* in Clarksville, of stock in
"trade with said son *John* of about $5,400, to still con-
"tinue to manage it to the best advantage as he has done
"for several years past, with all purchases that he has
"made of said stock for the benefit of *John* and *W. Bul-*
"*lock*, I do hereby leave for the benefit of the heirs of
"*W. Bullock;* it is well known that the first moiety given
"my son *William*, there is none remaining.

"Having about 18 negroes at the mill plantation in
"addition to them will be added *Gabriel*, &c. making if
"no mistake in count, twenty-seven there, with all the
"stock of every description in said plantation except
"such property as my son *W. H.* has in loan and brought
"with him, with all thereto pertaining, with the balance
"of the concern in Warren, with all the debts due me
"after discharging my own debts, with every other spe-
"cies of property I possess that does not belong to the
"tract of land whereon I now live, after paying *James*
"his legacy, be equally divided between my sons *John*,
"*Richard* and the heirs of *W. H. Bullock* as one distrib-
"utee, my daughter *Susan Jiggits*, *Lucy Lewis*, the
"heirs of *Fanny Hunt* as one distributee, and my son
"*James M. Bullock*, all the foregoing property, to be
"equally divided share and share alike; but it will be
"understood, that my son *John Bullock* and the heirs of
"*Fanny Hunt* will have a considerable draw-back as
"they are considerably beforehand in receiving of my
"estate; therefore, what they have and will receive will
"be accounted as part of their legacy and the quota

Dec. 1832.

BULLOCK v. BULLOCK

"made up to them, so as all will share and share alike "at the first division.

"After the death of my wife, I wish an equal division "of my estate that may have been loaned to her or my "son *James*, with every species of property not hereto- "fore given, to be equally divided between my son *John*, "*Richard* and the heirs of *W. Bullock*, as one distributee, "my daughter *Susannah Lucy*, the heir of *Fanny Hunt*, "as one distributee, and my son *J. M. Bullock* share and "share alike, all the property that will be received by "virtue of this my last will and testament, (not adver- "ting to that that has been heretofore given.) I give it "on the following conditions: if those to whom it is giv- "en die without a lawful heir, then in that case for their "property to return to the surviving brothers and sis- "ters, or to their heirs in case they should die first and "leave heirs."

"A codicil to the foregoing will.

"I give unto my son *Richard Bullock*, negro boys "*Anthony* and *Sam* now in his possession. I give unto "my son *John Bullock*, for the benefit of the heirs of *W.* "*Bullock*, which may proceed from his body, *Jonas*, &c. "with their future increase. The negroes named in the "foregoing will given my son *John* for the benefit of the "heirs of *W. Bullock* and *Fanny Hunt*, which was nam- "ed without the increase, but be it understood that I "intended to convey them and their increase, and do "hereby convey them and their increase."

Of this will the testator appointed his son, the plaintiff, sole executor. The bill charged that in many respects it was difficult to put a construction on the will which was satisfactory to the plaintiff or which he could safely adopt, especially as some of the legatees and devisees (those supposed to be intended by the description of the heirs of *William H. Bullock* and *Fanny Ann Hunt*, for whom the plaintiff was constituted testator,) were infants of tender years. The bill then set forth the difficulties which the plaintiff experienced, in the following order: That it was uncertain whether the issue of the slaves

mentioned in the first, second and fifth clauses of the will passed to the legatees respectively named therein, or was a part of the residue and subject to division as provided by the residuary clause.

That as to the bequest to the plaintiff of the testator's interest in the Clarkesville store "in trust for the heirs of *William H. Bullock*," the plaintiff alleged that he was in that store a partner with his testator—that the testator's interest therein had been appropriated by him for many years to the maintenance and support of the family of his son *William H. Bullock* who had become insolvent —that by these advances the property had been nearly exhausted—that it was the testator's habit to charge his children with all the property which he conveyed to them and credit them with that which they returned to him—that a short period before the death of the testator the plaintiff had by his directions assigned all the effects of that partnership to the heirs of *William* and *Richard Bullock*, another company in which the testator was interested, that one half of the sum paid by the latter copartnership for this assignment was placed on the books of the testator to the credit of *William H. Bullock*, so that in appearance this was a debt due him when in fact it was a legacy. The plaintiff in this respect prayed that this balance might be declared not to be a debt, and as he occupied the threefold character of surviving partner, executor and trustee, that his accounts might be settled under the direction of the court; and farther that it might be declared whether in the legacy to the plaintiff in trust, for the heirs of *William H. Bullock*, the testator's share of the profits passed.

The plaintiff then set forth his belief that the testator constituted him a trustee for the children of his son *William* and his daughter *Fanny Ann Hunt*, solely because of the insolvency of their respective fathers, and that he had the utmost confidence in the integrity of his son and son-in-law and would have constituted them trustees for their respective children, had he not feared that thereby the property given the latter would have been subjected to the debts of their fathers.

Dec. 1832.

Bullock v. Bullock

The plaintiff then avowed his belief in the integrity of his brother and brother-in-law, and prayed that they be constituted in his stead. If the plaintiff could not succeed in this, then he prayed that it might be declared whether he was a trustee for the children of *William H. Bullock* and *Fanny Ann Hunt* born at the date of the will, or at the death of the testator—or whether the trusts extended to children subsequently born. The plaintiff further requested direction as to the course he was to pursue in making the final division, whether he was to estimate in making up the share of each of the legatees the balances against them on the books of his testator, and also the pecuniary and specific legacies given them by the will; and as he was interested in that division, that it might be made under an order of the court.—Upon this subject the plaintiff admitted that he was to account in the division of the residue for the 4000 dollars given him by the fourth clause of the will, and he insisted that the testator, in speaking in the tenth clause of the drawback due by the plaintiff and the heirs of *Fanny Ann Hunt*, alluded to the 4000 dollars given the former and to the payment mentioned in the eighth clause made by him for the land devised to the heirs of the latter.—And finally, the bill stated that the plaintiff was entirely ignorant of the property which was subjected to the cross remainders created by the last clause of the will—whether the cross remainders attached upon all the property which passed under the will, or were confined to that disposed of by the residuary clause—whether they applied to all legacies as well pecuniary as specific, or whether they were confined to the last—and if applicable to the pecuniary legacies, the plaintiff prayed he might be protected in paying them over. All the parties interested under the will, were made defendants—of these *William B. Inge* was a non-resident and did not appear and answer.

By an amendment, the plaintiff stated that one of the children of *Fanny Ann Hunt* had died and that he had been advised to administer upon its estate, but he averred that he was entirely ignorant whether the interest of

that child under the will of his testator survived to its brothers and sisters, or whether he, the plaintiff, held it in trust for the next of kin, and in this respect he prayed instructions.

By consent, the master in the court below was directed to enquire whether *Wm. H. Bullock* and *John Hunt* were proper persons to substitute as trustees for their respective children, and whether the property of their children would be safe in their hands. It was also referred to him to state an account of the Clarkesville copartnership, and of the amount which the testator had paid, and the plaintiff was still liable to pay for the land devised to the heirs of *Fanny Ann Hunt*, and also to state an account of the property advanced by the testator to his children, contained in the books. The master reported that *W. H. Bullock*, and *John Hunt* were proper persons to appoint trustees for their children, and that the property which their children took under the will, would be safe in their hands. He also stated the accounts ordered to be taken, and there were no exceptions filed to his report.

The case was discussed several terms ago, by *Nash* for the plaintiff, and *Badger* and *Devereux* for defendants. The plaintiff made no questions which were adverse to the interest of the several defendants, but submitted to any decree which would indemnify him.

HENDERSON, Chief-Justice.—This bill is filed by *John Bullock*, executor of *Wm Bullock*, to have the *trusts* of his testator's will declared, and to have the *advice* of the court on the execution of them. It is a proper case for such an application, as the will in many parts is of very doubtful meaning.

The question which presents itself is as to the increase of the slaves bequeathed to his daughters *Susan Jiggits* and *Lucy Lewis*, and to his grandson, *Wm. B. Inge*. As to the latter, we decline to give an opinion, as the testator says he has made his grandson a deed of gift for the slaves. This deed must determine the question, and we have it not before us.

Dec. 1832.

BULLOCK v. BULLOCK

A legacy to a daughter of "the negroes I placed in her possession at her marriage," passes the increase as well as the original stock.

A parol gift of slaves is not entirely void by the act of 1806, (*Rev. c.* 701,) the death of the donor, or a confirmation of it by him renders it good *ab initio*.

As to the two former, we think that the increase passed to his daughters respectively, together with the original stock, as we look upon the bequests rather as confirmations of prior gifts than as legacies *de novo*. The testator in describing the original stock, says they are the slaves which he put into their possession, upon their marriages respectively. Our act of 1806. (*Rev. c.* 701,) does not annul entirely gifts of slaves made by parents to children, either express, or those presumed from a delivery of possession, but leaves them in the hands of the child as an advancement, if the parent does not by will or otherwise, declare the contrary. And although in this case, they are not advancements, so as to be brought into hotch-pot, for there is no intestacy, yet they have that character so far as to form a guide in arriving at the testator's intent. There are additional reasons appearing upon other parts of the will, which support this conclusion. In the clause creating cross remainders, we understand that this property is not esteemed as property received under the will, but as falling within the description of that heretofore received. The codicil affords strong proof, that as to these legacies he did not deem it necessary to mention the increase in order to pass them. For he therein declared, that as to the increase of the negroes bequeathed to his son *John*, in trust for the heirs of his son *William*, and of his daughter *Fanny Ann*, he intended it should pass, and is silent as to the increase of those bequeathed to his daughters *Susan* and *Lucy*. In the will, they were bequeathed in the same way without the increase. As to those given in trust for the heirs of his son and daughter, there had been no prior gift or delivery to the trustee, or the heirs, which the will could confirm. And therefore the testator very probably concluded, that it required express words to carry the increase. He there inserted the increase in the codicil as to them and said nothing as to the legacies in question, thinking as we believe, that the increase passed by the confirmation of the original gift. An additional reason might be given. He made a deed of gift to his grandson, *Wm. B. Inge*,

for the negroes he put into the possession of his mother under the same circumstances. This deed carried the interest from its date. Why then it may be asked, should he make this exception against these two daughters?

A legacy of stock in trade and all purchases made therewith, gives the legatee the profits thereon.

We think also, that the bequest to the plaintiff of the testator's interest in the Clarkesville store, in trust for the heirs of his son *William*, carries with it the testator's share of the profits. This, we think, sufficiently appears on the face of the will. But taken in connexion with the master's report made from the books of the concern, and from the testator's own books, to which we think the testator has given a testamentary character and which ought to be proved as parts of his will, as far as they are referred to in it—there cannot be a doubt on the subject. The words of the will are—"my said son *John*, (who became the partner of the testator after the purchase) is to continue to manage it to the best advantage, as he has done for several years past, with all the purchases he has made of (with) said stock, for the benefit of *John* and *William Bullock*, I do hereby leave for the benefit of the heirs of *Wm. H. Bullock*." From the master's report, it appears that nearly the whole of the stock and profits, at least a great part thereof, had been applied to the use of *William H. Bullock*, with the testator's consent. I say with his consent, for he was a partner, and lived in the neighborhood, and it is presumed he knew the state of the books. And further, the sum of $1015 10, the one half of the amount given for the goods by *William* and *Richard Bullock*, to *William* and *John Bullock*, is carried to the testator's own books, and entered as a credit thereon to *Wm. H. Bullock*. We cannot but understand from this, that the appropriations made to the use of *William H. Bullock*, by *John Bullock*, the active partner, were known to and approved of by the testator. And these advances made to *Wm. H. Bullock*, and appearing on the testator's books, as charges against him, against whom and all his other children, it appears that the testator kept accounts, is conclusive evidence to show, both that the testator in-

DEC. 1832.

BULLOCK v. BULLOCK

tended the profits to pass; and also approved of the appropriation of both stock and profits by the plaintiff, the active partner, to the use of *Wm. H. Bullock*. No exceptions being taken to the master's report on this subject, the same is confirmed; and the executor is directed in closing the accounts of said concern, to make the said report the basis of the settlement.

A legacy to the heirs of a living person, is to be construed as to his children, if it appears upon the will that he is living.

And in that case after born children take under the words "heirs proceeding from his body."

The next question is, as to the meaning of the words, *heirs of the body*, or *heirs proceeding from the body*; for the testator uses both expressions indiscriminately.—The words import a present gift. And if there is no person to take the legacy, it is void. As to the meaning of the words *heirs of the body of Wm. H. Bullock*, we are relieved from all difficulty on the subject. For the testator notices in another part of his will, that his son *William H.* is alive. In speaking of some article, he says, "which my son *William H.* has now on loan."—Evidently therefore, he did not mean *heirs* in its technical sense, the representatives of a dead man, but heirs apparent, to wit, issue, children. And we think the same construction must be put on the words, "heirs of the body of *Fanny Ann Hunt*." In the first place, we have a specimen of the testator's meaning of the words, and unless controlled by other words, the same words should have the same meaning; and especially, when used by the same person in the same instrument, on the same subject matter. The words are "proceeding from the body;" which word *proceeding*, is future, contingent, not past—which *have* proceeded. It looks forward to the having of *other* children. Another reason might be given, if necessary. The testator mentions his daughter, *Fanny Ann*, many times. He never declares whether she is living or dead. He mentions his daughter *Elizabeth*, but once. He then calls her his "deceased daughter." I have avoided touching on the doctrine of the case of *Stith* v. *Burnes*, (1 *Law. Rep.* 484.) We are therefore of opinion, that in each case, the words heirs of the body mean children, or rather issue. The next question is, do these words take in after born children; or is it confined to those born at the making of the will, or the tes-

tator's death. We think it embraces all. And we rely on the word *proceeding* as sufficient, independently of all other reasons. We are aware that in the conveyance of a mere legal estate, the estate cannot open and shut, as it is called. For the estate must pay to the grantee at first, or not at all. I speak of immediate freehold interests. It is otherwise as to a use or a trust. These may cease in one person in whole or in part, and arise in another. And if it be a use, a sufficient *scintilla* of seisin remains in the trustee, to be converted into a seisin to feed the new use. And it is the same in wills. But here there is not only a will, but a trustee also for the heirs, as well those born as those to be born. This is said as to the lands. As to the personal estate, the inconvenience of permitting it, is here avoided. For the legatees in trust are not entitled to the control of the property, or to call for an immediate conveyance on account of these ulterior trusts; so that there is no danger of its being wasted or eloigned, to defeat the ulterior *cestuis que trust*. And we can therefore see no reason, why the personal estate also, should not open upon the birth of a child, and let it in to the benefit of the trust. And if there was no trustee appointed by the will, the court, to effectuate these intents, would declare the heir and executor trustees for that purpose.

The next question is, what property is subject to the cross remainders? From the will we are bound to say *all the property taken under it*. These are the testator's words; and there is nothing in the will to control them, or vary the meaning, only the expression "not adverting to what has heretofore been given." This can control them so far only, as to exclude all property, which the will states, either expressly or impliedly, to have been heretofore received. For as to that, the testator has made the will more confirmatory than legatory. But we cannot travel out of the will to ascertain what he intends to confirm as a gift or *quasi* gift, and what he intends as a legacy *de novo*, entirely under the will.

[His Honor then proceeded to specify what property was subject to the cross remainders, and came to the con-

Dec. 1832.

BULLOCK v. BULLOCK

clusion, that all the property which had not been given by the testator to his children before the date of the will, was thus subject—including in this exception, property which had been given to *William H. Bullock*, and *Fanny Ann Hunt*, but which was by the will devised to the plaintiff in trust for their several children.]

The Executor has asked the advice and assistance of the court, in regard to the property subject to the cross remainders. He must take bonds from the legatees with ample sureties payable to himself, that the property shall be forthcoming, in case it shall be necessary, to perform the ulterior trusts of the testator's will.

Upon the subject of accountability for the receipts and advancements to equalize the distribution, upon what the testator calls the first division of his estate, we are left somewhat in the dark. But after much consideration, we think that nothing received under the will, except the $ 4.000 to *John Bullock*, and a part of the legacy given to him in trust for the heirs of *Fanny Ann Hunt*, are to be accounted for. The testator's will, as to what is equality, is the sole law. He can by his declaration so far as respects this question, make that equal which is in fact unequal. In giving the other legacies, he says nothing about inequality, but whenever he speaks of these two, he speaks of equality and drawbacks, and directs that they shall be accounted for upon the division. It appears also, that the testator had something else in view when he speaks of equalizing the other legatees. The master reports, that he had kept accounts against his children. It must be that he refers to those accounts, when he says, these two legatees are in advance of the others. Had not the testator by referring to his books, made them in some degree testamentary, we could not possibly travel out of the will to ascertain his meaning. In making the division, the executor will not consider the legacies given in the will, except as above mentioned, as creating the inequality to be made up upon the division. But he will be governed by the master's report on the subject, as to the advancements made to the different children; and will make that the basis on which

Accounts referred to in a will become testamentary and may be used in explanation of the testator's intention.

to found the equality directed by the testator, except as to the legacy to himself of $4,000, which he will take into the account as so much advanced him, together with interest thereon from the time he received it. He will also take into account the monies paid by the testator for the land devised to him, in trust for the heirs of *Fanny Ann Hunt*, together with all his testator's liabilities for *John Hunt*, deducting therefrom the bond which his testator gave to *John Hunt*, all which appears upon the master's report. The executor will strike a fair balance, and make what is due from *John Hunt* the basis of equalizing the legacy to the heirs of *Fanny Ann* upon the division. In striking the balance, the executor will include what he, as executor, has yet to pay on account of his testator's suretyship for *John Hunt*, as well as what he has paid.

The Clerk and Master having reported, that *William H. Bullock* and *John Hunt* are prudent and discreet persons, and properly qualified to take the management of the property bequeathed to their respective families, the executor is hereby authorized, if he thinks proper, to put the trust property in their hands respectively, for the support of their families and to permit them to expend the whole profits for that purpose, and in the education of their children, the master having reported that they are not more than sufficient for that purpose. But the property is to be under the supervision of the executor, who *may* at his pleasure withdraw it, and *must* do so upon their mismanagement.

As to the application of the trustee to be permitted to retire from the trusts, we can see no reason why he should, and therefore refuse his application.

We are also of opinion, that the heirs of *William H. Bullock* and the heirs of *Fanny Ann Hunt* form a unit each, and that upon the death of any one of them, the share of the one so dying goes to its heirs and next of kin, and not to the children of the testator.

PER CURIAM.—DECREE ACCORDINGLY.

Dec. 1832.

Bullock v. Bullock

At this term the plaintiff filed a petition verified by affidavit, in which he stated that the defendant *Richard Bullock* had become insolvent and as far as the interest of his infant *cestui que trusts* extended, he prayed that the legacy of the defendant *Richard* should not be paid over to him.

The defendants also filed a petition to rehear that part of the former decree which declared that all property which passed under the will was subject to the cross limitations—contending that it only applied to the property to be received at the last division. A rehearing was also had of the former order, refusing to substitute *William H. Bullock* and *John Hunt* as trustees for their children instead of the plaintiff.

Gaston, for the defendant.

Henderson, Chief-Justice.—We are satisfied with our former opinion, as to what part of the testator's property is subject to the limitations in cross remainder; the words of the will are too strong and point too plainly to what shall be received under the will as distinguished from that which had been heretofore received. The first, meaning that which the legatees had not possessed before but claimed entirely under the will; the latter, that which he had before the making of his will possessed them of, and confirmed to them by the will. We went as far as we could in declaring that the property put into the hands of *William H. Bullock* and *Fanny Ann Hunt*, and by the will given to *John Bullock* in trust for their respective children, to be property not received under the will in the meaning of the testator; substituting the trustee to their prior possessions, and their children to them.

We think that we erred in directing the executor not to pay or deliver over the property subject to the cross limitations in remainder; for the testator has prescribed no conditions, and we think we cannot so do unless for some cause which we think would have determined the testator himself to provide the means by which his ulterior legatees should not be disappointed. In such a case we think it would be our duty to interfere, for we should

then speak what we presume the testator would himself say were he capable of speaking, or would have provided for had he foreseen the necessity. It is going very far then to take care of a remote contingent interest, to the prejudice of the near and immediate objects of the testator's bounty, for it almost necessarily reduces the legacy to its interests or profits only. However, where there is a cause for it, as insolvency or the like, we think that we are bound to interfere, and *John Bullock*, the executor, as guardian and next friend to *James Bullock*, and trustee for the children of *William H. Bullock* and *Fanny Ann Hunt*, having by his petition, verified by affidavit presented at this term, stated that *Richard* one of the legatees is insolvent to a very large amount, and praying that the said *Richard* should be restrained and enjoined from demanding any part of said legacy in cross remainder so far as those for whom he acts are concerned, we think that until the petition be disposed of, that the prayer of the petition should be granted and the benefit of it be extended to all, for if *Richard* be insolvent it should affect all those who may claim.

In remote limitations of personal estate the first taker is not to secure the forthcoming of the property to answer the ulterior limitations unless he be insolvent.

We therefore direct, that until bond and satisfactory surety be given by *Richard* for the forthcoming of the property as before mentioned, or until this court shall otherwise direct, the executor shall not pay said legacy or any part thereof to said *Richard*, and that the said *Richard* be restrained and enjoined from demanding and suing for said legacy.

In the former decree it was erroneously directed that the plaintiff should be charged with interest on the four thousand dollar legacy, from the time he received it. The court reverses so much of that decree and now declares that the same is payable out of the funds of *Norwood* and *Bullock* from the first money received therefrom after the payment of the debts of the firm. The legatee is and was entitled to receive the same out of the first money collected from said firm, after paying the debts thereof and that he is not chargeable with interest thereon, but if the fund is sufficient, he is entitled to interest thereon from one year after the testator's death until he recover the amount.

Dec. 1832.

BULLOCK v. BULLOCK

The petition of *William H. Bullock* and *John Hunt* praying to be substituted for *John Bullock* as trustee for their children respectively, is continued for further consideration.

PER CURIAM.—DECREE ACCORDINGLY.